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BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

SUQUAMISH TRIBE, KITSAP CITIZENS
FOR RESPONSIBLE PLANNING, and
JERRY HARLESS,

Petitioners,

v.

KITSAP COUNTY,

Respondent,

and

CITY OF PORT ORCHARD,

Amicus Curiae

Case No. 07-3-0019c

(Suquamish II - Remand)

**FINAL DECISION AND ORDER
ON REMAND**

SYNOPSIS

On remand from the Court of Appeals, the Board reviewed the challenges to Kitsap County's 2006 Plan Update based on current local circumstances without assumption of a bright-line rule for minimum urban densities. The Board found local circumstances did not support the County's down-zoning of minimum densities in its UGAs. The Board concluded the down-zoning and resultant UGA expansion created inconsistencies with the comprehensive plan, did not comply with RCW 36.70A.110, and was not guided by GMA Goals 1 and 2.

The Court of Appeals also directed the Board to address issues concerning the County's land capacity analysis. The Board determined the County double-dipped when it discounted twice for constrained lands in its Urban Restricted designation. The Board also determined,

1 regardless of a bright line rule, four dwelling units per acre was not an appropriate capacity
2 multiplier in the County's Urban Low and Urban Cluster designations.

3
4 Findings and conclusions in the August 17, 2007, FDO based on a bright line density or
5 contrary to the Board's findings and conclusions in this Order are reversed. The Board
6 denied Petitioners' request for invalidity and set a one-year compliance schedule in
7 recognition of the complexity of the matter.
8

9 I. PROCEDURAL BACKGROUND

10 Kitsap County adopted the 10-year update of its comprehensive plan in 2006 (2006 Plan
11 Update) with the enactment of four ordinances. Petitioners filed petitions for review
12 challenging provisions of Ordinances 370-2006 and 367-2007 on various grounds. The
13 Board's Final Decision and Order (FDO), issued August 17, 2007, found the County's use of
14 4 dwelling units per acre in its UGA zoning to be an appropriate urban density and approved
15 the County's land capacity analysis, but found the capital facilities plan and the County's
16 Rural Wooded Incentive Program (RWIP) noncompliant. After two compliance hearings, the
17 Board entered findings of compliance with respect to the RWIP provisions and the capital
18 facilities plan.¹ The petitioners appealed, challenging the Board's rulings concerning urban
19 density, the land capacity analysis and the RWIP.
20
21

22 The Court of Appeals reversed in part and remanded under an opinion published as
23 *Suquamish Tribe v Central Puget Sound Growth Management Hearings Board*, 156
24 Wn.App. 743, 235 P.3d 812 (2010).
25
26

27 As to the RWIP, the parties on remand stipulated to dismissal of the related issues, based
28 on the County's repeal of the RWIP provisions. The Board issued an Order of Partial
29 Dismissal on Remand [Rural Wooded Incentives Program] (May 10, 2011). Port Gamble
30 S'Klallam Tribe, an Intervenor as to the RWIP issues, withdrew from the case.
31
32

¹ April 4, 2008, Order Finding Partial Compliance and Noncompliance and Invalidity; June 5, 2008, Order Finding Compliance.

1 A remand conference was held telephonically on May 15, 2011. Seeking to expedite the
2 proceedings, the parties agreed to a compressed schedule, with motions to supplement the
3 record to be filed simultaneously with prehearing briefs. Petitioners prepared a coordinated
4 statement of legal issues and agreed to file a single brief. Briefs on the merits and motions
5 for supplementation were timely filed.²
6

7
8 The Hearing on Remand was convened July 7, 2011, by Margaret Pageler, presiding
9 officer, in the Kitsap County Commissioners' Conference Room in Port Orchard. Panelists
10 for the Board were William Roehl and James McNamara.³ Petitioner Suquamish Tribe was
11 represented by its attorney Melody Allen. Petitioner Jerry Harless was present pro se.
12 Petitioner Kitsap Citizens for Responsible Planning (KCRP) was represented by its attorney
13 David Bricklin. Mr. Bricklin and Mr. Harless presented the arguments of the petitioners. The
14 County was represented by Deputy Prosecuting Attorney Shelley Kneip, accompanied by
15 County Planner Eric Baker. Amicus City of Port Orchard was represented by its attorney
16 Jennifer Forbes. A number of public officials and interested citizens attended the hearing.⁴
17 Court reporting services were provided by Sherrilyn Smith of Buell Realtime Reporting, LLC.
18
19

20
21 ² The following pleadings were submitted:

- 22 • May 25, 2011 Petitioners' Opening Brief on Remand with Exhibits
- 23 • May 25, 2011, Petitioners Motion to Supplement with 8 exhibits
- 24 • June 1, 2011, Kitsap County's Response to Petitioners' Motion to Supplement and to Have the Board
25 Officially Notice 2006 OFM Numbers
- 26 • June 17, 2011, Petitioners' Reply to County's Response to Motion to Supplement the Record on
27 Remand
- 28 • June 16, 2011, Motion of City of Port Orchard for *Amicus Curiae* Status and Brief *Amicus Curiae* Brief
29 of the City of Port Orchard with exhibits
- 30 • June 23, 2011, Petitioners' Response to the City of Port Orchard's Motion for *Amicus Curiae* Status,
31 Motion to Supplement, and Petitioners' Motion to Strike
- 32 • June 23, 2011, Kitsap County's Brief on Remand and Exhibits
- June 23, 2011, Kitsap County's Request for the Board to Take Official Notice of Local Law
- July 1, 2011 Petitioner's Reply on Remand, Response to County's Motion to Supplement the Record,
and Response to the City of Port Orchard's *Amicus Curiae* Brief

³ Board member Dave Earling has resigned from the GMHB and a replacement has not yet been appointed by Governor Gregoire. The panel hearing this matter consists of Margaret Pageler, presiding officer, James McNamara, and William Roehl.

⁴ Attendees included Kitsap County Commissioners Charlotte Garrido, Josh Brown, and Robert Gelder, City of Port Orchard Planning Director James Weaver, City of Poulsbo Mayor Becky Erickson, Kitsap County

1 The hearing afforded each party the opportunity to emphasize the most cogent facts and
2 arguments relevant to the remand. Board members asked questions seeking to thoroughly
3 understand the history of the proceedings, the important facts in the case, and the legal
4 arguments of the parties.
5

6 7 **II. JURISDICTION, STANDARD OF REVIEW, AND SCOPE OF REMAND**

8 **• Board Jurisdiction**

9 In its FDO, the Board affirmed its jurisdiction in these proceedings.⁵ No question of
10 timeliness, standing or subject-matter jurisdiction was raised to the Court or at issue on
11 remand.
12

13 **• Standard of Review**

14 In *Swinomish Indian Tribal Community, et al. v Western Washington Growth Management*
15 *Hearings Board*,⁶ the Supreme Court summarized the Board's standard of review:
16

17 The Board "shall find compliance unless it determines that the action by the
18 [county] is clearly erroneous in view of the entire record before the board and
19 in light of the goals and requirements of [the GMA]." RCW 36.70A.320(3). An
20 action is "clearly erroneous" if the Board is "left with the firm and definite
21 conviction that a mistake has been committed." "Comprehensive plans and
22 development regulations [under the GMA] are presumed valid upon adoption."
23 RCW 36.70A.320(1). Although RCW 36.70A.3201 requires the Board to give
24 deference to a [jurisdiction], the [jurisdiction's] actions must be consistent with
25 the goals and requirements of the GMA.

26 As to the degree of deference to be granted under the clearly erroneous standard, the
27 *Swinomish* Court stated:⁷
28

29 Department of Community Development staff Angie Silva, Heather Adams, Katrina Knutson and Cindy Read,
30 and attending citizens from the County planning commission, boundary review board, petitioner organizations,
31 and others – Allison O'Sullivan, Charlie Burow, Bill and Judy Matchett, Jan Wold, Irwin Krigsman, Ronald
32 Eber, Phil Best, Karanne Gonzalez Harless, and Tom Nevine.

⁵ FDO, at 5

⁶ 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007) (internal case citations omitted).

⁷ 161 Wn.2d at 435, fn. 8 (internal citations omitted).

1 The amount [of deference] is neither unlimited nor does it approximate a
2 rubber stamp. It requires the Board to give the [county's] actions a "critical
3 review" and is a "more intense standard of review" than the arbitrary and
4 capricious standard.

5 The Court of Appeals, in deciding the present case, summarized:⁸

6 The GMA affords broad discretion to local governments in planning for growth,
7 bounded only by the GMA's goals and requirements.⁹ Boards must afford a
8 county's actions great deference so long as the action complies with the GMA
9 and is not clearly erroneous.¹⁰ ... A board must presume that a county's action is
10 valid, leaving the challenger to meet the burden of establishing invalidity.¹¹

11 The Court's *Suquamish Tribe* opinion makes clear the presumption of validity, deference to
12 County action, and burden on petitioners is equally applicable to the remand proceedings.

13
14 • **Scope of Remand**

15 The Court of Appeals in *Suquamish Tribe* reversed this Board's ruling in the FDO that four
16 dwelling units per acre (du/ac) was an appropriate urban density:

17 The Board erred when it used a bright-line rule to approve the minimum urban
18 density of four dwelling units per acre in Kitsap County.¹²

19 The Court further ruled the Board's reliance on a bright-line urban density resulted in failure
20 to decide issues necessary to the resolution of the case:

21 We remand to the Board for it to consider whether

- 22 (1) local circumstances show that four dwelling units per acre is an appropriate
23 urban density in Kitsap County at this time,
24 (2) reducing minimum density is internally inconsistent with the comprehensive
25 plan goals, and
26 (3) reducing minimum density is consistent with the GMA's goals.¹³

27
28
29 ⁸ 156 Wn.App. 743, at 759

30 ⁹ *Id.* citing *King County v. CPSGMHB*, 142 Wn.2d 543, 561, 14 P.2d 133 (2000) and *Thurston County v*
Cooper Point Ass'n, 148 Wn. 2d 1, 13-15, 57 P.3d 133 (2002).

31 ¹⁰ *Id.* at 760, citing RCW 36.70A.320(2), and *Lewis County v. WWGMHB*, 157 Wn.2d 488, 497, 139 P.3d 1096
(2006).

32 ¹¹ *Id.* citing RCW 36.70A.302(2) and *City of Redmond v CPSGMHB*, 116 Wn.App. 48, 55, 65 P.3d 337 (2003).

¹² *Id.* at 765

¹³ *Id.* at 780

1 We remand for the Board to decide, based on current local circumstances, and
2 without reliance on the four dwelling units per acre bright line rule, whether the
3 County “double-dipped.”¹⁴

4 If local circumstances support a minimum urban density of four dwelling units per
5 acre, the Board must also decide whether the County creates inconsistencies with
6 the GMA’s goals, the Buildable Lands Report, and the plan when it uses such a
7 minimum density in the land capacity analysis.¹⁵

8 III. PRELIMINARY MATTERS

9 At the pre-hearing conference on remand, the Board discussed with the parties the Court’s
10 requirement to focus on “current local circumstances” and noted the possible need to
11 supplement the record and the likelihood of intervention by additional parties. The parties
12 made substantial efforts to reach agreement on framing the issues and defining the record.
13 Especially given the protracted proceedings and difficult issues in this case, the Board
14 commends the professionalism and courtesy of all participants.
15

16
17 At the outset of the remand hearing, the *amicus* motion and the parties’ motions for
18 supplementation and objections were reviewed, including the supplementation requested by
19 Port Orchard as *amicus*. The Board ruled as follows.
20

21 • Amicus Curiae

22 The City of Port Orchard submitted a motion and brief *amicus curiae* in support of the
23 County. The Board ruled on the motion at the Remand Hearing, granting *amicus*.
24

25 While clarifying that *Amicus* does not participate in oral argument at the hearing,¹⁶ the Board
26 reviewed with the parties the exhibits proposed for introduction by Port Orchard. Petitioners
27 objected in particular to proposed items 5-17 and moved to strike the related portion of Port
28
29
30

31 ¹⁴ *Id.* at 781

32 ¹⁵ *Id.*

¹⁶ WAC 242-02-280(3) [The Board’s Rules of Practice and Procedure have been revised and are now found at Chapter 242-03 WAC.]

1 Orchard's statement of facts. The Board agreed that items 5-17 are post-2006, of
2 questionable value, and unnecessarily complicate a very-long record.

3
4 The Board ruled orally on the proposed exhibits as follows:

- 5 ▪ Port Orchard Ordinance 011-09 – Annexing McCormick Woods – see County
6 supplementation below
- 7 ▪ Bremerton Ordinance 5053 – Annexing SKIA industrial area – see County
8 supplementation below
- 9 ▪ Bremerton Municipal Code 20.60.065 – zoning densities – see County
10 supplementation below
- 11 ▪ City of Port Orchard 2008 Comp Plan – a post-2006 adoption, and not necessary for
12 the Board's understanding of the facts at issue, which are adequately supported by
13 other documents in the record – **Denied and withdrawn**
- 14 ▪ #5-17 – references from websites indicating (a) difference of Kitsap County from
15 King, Snohomish or Pierce Counties and (b) facts regarding four cities – **Denied and**
16 **withdrawn**
- 17 ▪ #18-31 -- Exhibits **already in the record**

18 *Amicus* Port Orchard submitted a substitute brief post hearing.¹⁷ The substitute brief relied
19 on facts cited from the record rather than on post-2006 web sites. No party objected to the
20 substitution. The Board **grants** the *Amicus* motion and **accepts** *Amicus Curiae* Brief of the
21 City of Port Orchard (Revised).

22 • **Petitioners' Motion to Supplement the Record**

23 Petitioners' proposed additional exhibits were primarily items already in the record or
24 matters of official notice. The Board rules on the supplementation as follows:

- 25 ▪ Ex. A Index No. 30986 – 2006 Comprehensive Plan Excerpts – **already in record**
- 26 ▪ Ex. B Index No. 30987 – 2006 FEIS Excerpts – **already in record**
- 27 ▪ Ex. C Exhibit CH-2, 2007 Buildable Lands Report Excerpts – **Supplementation**
28 **allowed for the limited purpose of footnotes 86 and 197.**
- 29 ▪ Ex. D Exhibit CH-1, Kitsap County Resolution 07-2008¹⁸ – **Denied**
- 30 ▪ Ex. E Index No. 31061 – 2004 Comprehensive Plan Excerpts – **already in record**

31
32 ¹⁷ *Amicus Curiae* Brief of the City of Port Orchard (**Revised**), July 14, 2011.

¹⁸ Resolution 078-2008 formally adopted the 2007 Buildable Lands Report and noted various meetings
between the County and cities in developing the report, beginning in mid-2006.

- 1 ▪ Ex. F Appellate Court decision in *Suquamish Tribe et al v CPSGMHB* – Board takes
- 2 **official notice**
- 3 ▪ Ex. G County Prehearing Brief at 19 (June 14, 2007) - **Denied**¹⁹
- 4 ▪ Ex. H OFM Population Estimates April 1, 2006 - **Denied**²⁰

5 As to the 2007 Buildable Lands Report (BLR) and adopting resolution (proposed Exhibits C
6 and D), the Board notes these are post-2006 actions. The parties agreed at hearing that
7 facts concerning platted densities achieved in the unincorporated UGA during the 2000 to
8 2005 period²¹ were in the record before the County when it adopted its 2006 comprehensive
9 plan update. However, the parties dispute whether the BLR analyses concerning the Kitsap
10 cities is admissible. The Petitioners assert the raw data concerning platted densities in the
11 cities²² was available to the County in 2006, and the County had access to the city data;
12 therefore the 2007 BLR containing the subsequently-aggregated data is admissible. The
13 County denies the city data had been aggregated or considered by the County
14 Commissioners when they enacted the 2006 Plan Update.

15
16 The Board notes the 2007 BLR was made part of the record in the underlying case in
17 connection with the June 5, 2008 Compliance Hearing.²³ Further, the 2007 BLR was before
18 the Court of Appeals.²⁴ The Court notes the Petitioners' assertion that the [2007] Buildable
19 Lands Report documents "actual existing and trending up average density."²⁵ The Court's
20 remand then expressly requires the Board to decide "whether the County creates
21 inconsistencies with ... the Buildable Lands Report."

22
23
24 Further, in connection with a county's 10-year update of its UGAs, RCW 36.70A.130(3)(a)
25 requires each city to "review the densities permitted within its boundaries and the extent to
26

27
28 _____
29 ¹⁹ Arguments in a party's briefing in a prior phase of such a drawn-out proceeding as this one are unlikely to be
30 of probative value.

31 ²⁰ The Board will use Bremerton population from Index 31054 and the Port Orchard and Poulsbo population
32 indicated in Footnote 86, *infra*.

²¹ Set forth on p. 40 of the 2007 BLR and in Appendix B (calculations for each UGA)

²² Summarized on pages 30, 33 and 36 of the 2007 BLR and Appendix B

²³ Order Finding Compliance (June 5, 2008), at 2.

²⁴ *Suquamish Tribe*, 156 Wn.App. at 750, fn 3; 757

²⁵ *Id.* at 780-781

1 which the urban growth occurring within the county has located within each city.”²⁶ The
2 statute thus requires a review of permitted densities and the population growth occurring in
3 the cities as well as in the unincorporated areas. The Board will assume the County had
4 access to this information (in compliance with the statute). The Board has not found all of
5 the necessary facts, however, in the written record provided by the parties. The Board
6 therefore supplements the record with the 2007 Buildable Lands Review for the limited
7 purpose of documenting the facts concerning city populations and densities set forth in
8 footnotes 86 and 197, *infra*. The Board determines this information may be necessary or of
9 substantial assistance to its decision in this case.

11
12 • **Kitsap Motion for Official Notice**

13 Kitsap moves for official notice of four “local legislative enactments.”

- 14 ▪ Bremerton Municipal Code 20.60.065 – establishes targets of 6 du/acre with 5du/acre
15 minimum for low density residential and 7du/acre for “underutilized urban fringe
16 areas” – Not necessary or of substantial assistance as the relevant information is in
17 Index #29762 - **Denied**
- 18 ▪ Bainbridge Island Code 18.09 – includes zones that allow one or two units per acre.
19 Not relevant, as there is no associated UGA - **Denied**
- 20 ▪ Bremerton Ordinance 5053 (July 30, 2008) – SKIA North Annexation – **Board takes**
21 **official notice**
- 22 ▪ Port Orchard Ordinance No. 011-09 (May 12, 2009) – McCormick Woods Annexation
23 – **Board takes official notice**
- 24 ▪ **Illustrative Exhibits.**

25 The County provided the following illustrative exhibits at the remand hearing:

- 26 ▪ FEIS Figure 2.1.1, 2.6-1 and 2.6-2 – maps identifying UGAs
- 27 ▪ Chart – Comparison of County/City Urban Densities
- 28 ▪ Chart – Land Capacity Analysis
- 29 ▪ GMA Provisions – UGAs Must Accommodate all of the Projected Population

30 ²⁶ RCW 36.70A.130(3)(a): Each county that designates urban growth areas under RCW 36.70A.110 shall
31 review, at least every ten years, its designated urban growth area or areas, and the densities permitted within
32 both *the incorporated* and unincorporated portions of each urban growth area. In conjunction with this review
by the county, *each city* located within an urban growth area shall review the densities permitted within its
boundaries, and the *extent to which the urban growth occurring within the county has located within each city*
and the unincorporated portions of the urban growth areas.

IV. LEGAL ISSUES AND DISCUSSION

A. INTRODUCTION

- **The Challenged Action**

In late 2006, Kitsap County completed its 10-Year review and update of its Comprehensive Plan and development regulations as required by the Growth Management Act. The Suquamish Tribe, Kitsap Citizens for Responsible Planning, and Jerry Harless filed timely petitions for review challenging a number of the County's actions.

Petitioners took issue with the County's reduction of urban densities in its 2006 Plan Update and development regulations, which reduced the minimum density in certain low-density residential designations from 5 dwelling units per acre (du/ac) to 4 du/ac. This same reduction was used by the County in its land capacity analysis (LCA). Petitioners argued that the development trend in the County supported a continuing minimum density of at least 5 du/ac and the County's reduction allowed for an unnecessary expansion of urban growth areas (UGAs). The Board's Final Decision and Order (FDO) noted that in Kitsap County, 4 du/ac has historically been an "appropriate" urban density.²⁷ The Board ruled the GMA did not compel the County to base its actions on the trend of recent development. Likewise, the Board held the County's use of the lower density assumption in the LCA was not precluded by the GMA.²⁸

²⁷ FDO, at 13: "Since 1995, 4 du/ac has been an approved and accepted minimum urban density for Kitsap County," citing *City of Bremerton, et al v Kitsap County (Bremerton I)*, CPSGMHB Case No.95-3-0039c, Final Decision and Order (Oct. 6, 1995).

²⁸ However, while finding the Petitioners did not carry their burden in demonstrating noncompliance with the Urban Density and LCA issues, the FDO concluded the County's Capital Facilities Plan was noncompliant with goals and requirements of the Act because it did not demonstrate that there would be adequate public facilities and services [sanitary sewer] available to serve the urban growth areas during the planning period. Petitioners also prevailed on challenges to the County's Rural Wooded Incentive Program (RWIP) and Transfer of Development Rights (TDR) program, primarily due to the "temporary" [40-year] nature of these programs, which created ambiguity and uncertainty as to the status of development on these lands when the period lapsed. The County subsequently enacted legislation which brought these matters into compliance.

1 On appeal, the Court of Appeals reversed and remanded.²⁹ The Court ruled the Board erred
2 by applying a bright-line rule for urban density rather than considering current local
3 circumstances.³⁰ The Court also instructed the Board to decide a number of unresolved
4 issues – issues avoided in the FDO by reliance on the bright-line rule.³¹

5
6 The issues on remand were restated by Petitioners in six legal issues which the Board
7 addresses sequentially below, following a brief review of the GMA framework for urban
8 growth planning.

9
10 • **GMA Urban Growth Planning**

11 An Urban Growth Area is an area “within which urban growth shall be encouraged and
12 outside of which growth can occur only if it is not urban in nature.”³² The GMA defines
13 “urban growth” as “growth that makes intensive use of land for location of buildings,
14 structures, and impermeable surfaces to such a degree as to be incompatible with the
15 primary use of land for the production of food, other agricultural products, or fiber, or the
16 extraction of mineral resources, rural uses, rural development, and natural resource lands
17 designated pursuant to RCW 36.70A.170.”³³ The GMA requires counties to designate Urban
18 Growth Areas and set *boundaries* and *densities* to accommodate projected population
19 growth.³⁴
20
21
22

23 ²⁹ *Suquamish Tribe v CPSGMHB*, 156 Wn.App. 743, 235 P.3d 812 (2010).

24 ³⁰ 156 Wn.App. at 765: The Board erred when it used a bright-line rule to approve the minimum urban density
25 of four dwelling units per acre in Kitsap County.

26 ³¹ 156 Wn.App. at 780-781:

27 We remand to the Board for it to consider whether

- 28 (1) local circumstances show that four dwelling units per acre is an appropriate urban density in
29 Kitsap County at this time,
30 (2) reducing minimum density is internally inconsistent with the comprehensive plan goals, and
31 (3) reducing minimum density is consistent with the GMA's goals.

32 We remand for the Board to decide, based on current local circumstances, and without reliance on the
four dwelling units per acre bright line rule, whether the County “double-dipped.”

If local circumstances support a minimum urban density of four dwelling units per acre, the Board must
also decide whether the County creates inconsistencies with the GMA's goals, the Buildable Lands
Report, and the plan when it uses such a minimum density in the land capacity analysis.

³² RCW 36.70A.030(20); RCW 36.70A.110(1)

³³ RCW 36.70A.030(19)

³⁴ RCW 36.70A.110(1)

1 The statute requires:

2 Based upon the growth management population projection made for the county
3 by the office of financial management, the county and each city within the county
4 shall include *areas* and *densities* sufficient to permit the urban growth that is
5 projected to occur in the county or city for the succeeding twenty-year period....³⁵

6 In its seminal *Thurston County* decision, the Supreme Court held that a “UGA designation
7 cannot exceed the amount of land necessary to accommodate the urban growth projected
8 by OFM, plus a reasonable land market supply factor.”³⁶

9
10 Three of the GMA Goals further define the objectives served by designation of Urban
11 Growth Areas:

- 12 (1) Urban growth. Encourage development in urban areas where adequate public
13 facilities and services exist or can be provided in an efficient manner.
- 14 (2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land
15 into sprawling, low-density development.
- 16 (12) Public facilities and services. Ensure that those public facilities and services
17 necessary to support development shall be adequate to serve the
18 development at the time the development is available for occupancy and use
19 without decreasing current service levels below locally established minimum
20 standards.

21 The Supreme Court in *Thurston County* emphasized the goal of reducing sprawl by limiting
22 the size of UGAs: “If the size of a UGA is not limited, rural sprawl could abound.”³⁷

23
24 RCW 36.70A.130(3) establishes the required ten-year review of UGAs, calling for
25 assessment and possible revision of UGA boundaries and permitted densities:

- 26 (a) Each county that designates urban growth areas under RCW 36.70A.110 shall
27 review, at least every ten years, its *designated urban growth area* or areas, and
28 the *densities permitted* within both the incorporated and unincorporated portions
29 of each urban growth area. In conjunction with this review by the county, each
30 city located within an urban growth area shall review the densities permitted

31
32 ³⁵ RCW 36.70A.110(2) emphasis supplied

³⁶ *Thurston County v. WWGMHB*, 164 Wn.2d 329, at 351-52, 190 P.3d 38 (2008).

³⁷ 164 Wn.2d at 351.

1 within its boundaries, and the extent to which the urban growth occurring within
2 the county has located within each city and the unincorporated portions of the
3 urban growth areas.

4 (b) The county comprehensive plan designating urban growth areas, and the
5 densities permitted in the urban growth areas by the comprehensive plans of the
6 county and each city located within the urban growth areas, shall be revised to
7 accommodate the urban growth projected to occur in the county for the
8 succeeding twenty-year period.

9 RCW 36.70A.215 establishes a buildable lands review and evaluation program for
10 designated counties.³⁸ Each county, in consultation with its cities, must adopt County-wide
11 Planning Policies (CPPs) setting up a five-year review cycle to monitor urban development –
12 the Buildable Lands Review (BLR).³⁹ The BLR compares county/city growth assumptions
13 and targets with actual growth and development trends.⁴⁰ This statute provides, in relevant
14 part:⁴¹

15
16 (3) At a minimum, the evaluation component of the [BLR] shall:

- 17 (a) Determine whether there is sufficient suitable land to accommodate the
18 county-wide population projection established for the county pursuant to
19 RCW 43.62.035 and the subsequent population allocations within the
20 county and between the county and its cities and the requirements of RCW
21 36.70A.110;
- 22 (b) Determine the actual density of housing that has been constructed and the
23 actual amount of land developed for commercial and industrial uses within
24 the urban growth area since the adoption of a comprehensive plan under
25 this chapter or since the last periodic [BLR]; and
- 26 (c) *Based on the actual density of development* as determined under (b) of this
27 subsection, *review commercial, industrial, and housing needs by type and*
28 *density to determine the amount of land needed ...* for the remaining
29 portion of the twenty-year planning period used in the most recently
30 adopted comprehensive plan.

31 ³⁸ King, Pierce, Snohomish, Kitsap, Thurston and Clark Counties

32 ³⁹ RCW 36.70A.215(1).

⁴⁰ RCW 36.70A.210(1)(a) and (b).

⁴¹ RCW 36.70A.215(3) emphasis supplied

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1 Where cities and counties find inconsistencies between their targets for urban growth and
2 what is happening on the ground, as disclosed in the BLR, they are required to adopt
3 “reasonable measures, *other than adjusting urban growth areas*, that will be taken to comply
4 with the requirements of [the GMA].”⁴²

6 7 **B. LEGAL ISSUES 1-3**

8 • **Urban Density**

9 **Legal Issue 1 – Local Circumstances**

10 ***“We remand to the Board for it to consider whether (1) local circumstances***
11 ***show that four dwelling units per acre is an appropriate urban density in***
12 ***Kitsap County at this time”***⁴³

13 Legal Issue 1 is set forth in the Prehearing Order on Remand as follows:

- 14
15 1. *Is the minimum urban density of four dwellings per acre, reduced from five dwellings*
16 *per acre by Kitsap County Ordinances 370-2006 and 367-2006, an appropriate urban*
17 *density for Kitsap County when considering local circumstances; RCW 36.70A.020(1)*
18 *– (4) and (12); and RCW 36.70A.110?*

19 **Applicable Law**

20 RCW 36.70A.110, provides in relevant part:

- 21 (1) Each county that is required or chooses to plan under RCW 36.70A.040
22 shall designate an urban growth area or areas within which urban growth
23 shall be encouraged and outside of which growth can only occur if it is not
24 urban in nature.
- 25 (2) . . . [T]he county and each city within the county shall include areas and
26 densities sufficient to permit the urban growth that is projected to occur in
27 the county or city for the succeeding twenty-year period. . .

28 **Discussion and Analysis**

29 The County’s 2006 Plan Update reduced the minimum density for residential development
30 allowed in approximately 70% of its Urban Growth Areas. The Urban Low Residential (UL)
31

32 ⁴² RCW 36.70A.215(1)(b) emphasis supplied

⁴³ 156 Wn.App at 780

1 and Urban Cluster Residential (UC) Plan designations [in the Plan text and on the Future
2 Land Use Map or FLUM] were amended by reducing the permitted density ranges from a
3 minimum density of 5 dwelling units per acre (du/ac) to 4du/ac.⁴⁴

4
5 The zoning densities in the County's residential zones, as set in the 2006 Plan Update, are
6 Urban High Residential (19-30 du/ac), Urban Medium Residential (10-18 du/ac), Urban Low
7 Residential and Urban Cluster Residential (4-9 du/ac)⁴⁵, and Urban Restricted Residential
8 (1-5 du/ac). Urban Restricted Residential (UR) is used where critical areas impact 50% or
9 more of a parcel. Both UL and UC formerly required a minimum of 5 du/ac, a density level
10 established in Kitsap's 1998 Comprehensive Plan.
11

12 Fully 90% of the lands designated by the County for *urban* residential growth are within the
13 three lowest density zoning designations – UL, UC, and UR.⁴⁶ UL/UC lands provide roughly
14 70% of the planned residential capacity in the UGAs.
15

16
17 The *Suquamish Tribe* Court determined both the County's adoption of 4 du/ac as an
18 appropriate base urban density in the 2006 Plan Update and the Board's approval in its
19 FDO were based on an impermissible bright line. The Board must now review the County's
20 action based on local circumstances existing at the time of the update without reliance on a
21 bright line rule.
22

23
24 ⁴⁴ There are 43,560 square feet per acre. Gross lot size at 5du/ac is 8,610 square feet and at 4du/ac is 10,890
square feet.

25 ⁴⁵ Urban Cluster (UC) applies only in the Kingston and ULID#6 (McCormick Woods) UGAs.

26 ⁴⁶ FDO, at 13. In a post-HOM filing, Petitioner Jerry Harless and Kitsap County agreed on the following
corrected calculations.

27

Land Use Designation	% Gross Urban Residential Acres	% Net Urban Residential Acres	% Dwelling Unit Capacity
UM/UH/UVC/MU	8.86%	9.64%	26.03%
UL/UC	69.65%	74.51%	70.27%
UR	21.49%	15.84%	3.71%

28
29
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32 The calculation disregards the Poulsbo UGA, on the grounds that the 4 du/ac minimum in the Poulsbo UGA was not a "new reduction" in the 2006 Plan Update. The calculation also acknowledges the residential capacity provided in the Urban Village Center (UVC–Kingston) and Mixed Use (MU) designations. Post HOM Response of Kitsap County to Petitioners' Exhibits, with attached Corrected Exhibit A (July 9, 2007).

1 The Board begins with the County's assessment of the "Plan Context" in the Land Use
2 Chapter of the 2006 Plan Update. Referencing an inventory of existing land use conditions,
3 the Plan states:⁴⁷
4

5 Key issues related to existing land use conditions in the unincorporated county are
6 summarized as follows:

- 7 ▪ The predominant pattern of residential development throughout the
8 unincorporated areas, including the rural area, is low-density single family.
9 Almost half of the developed acreage in the designated UGAs has 5 dwelling
10 units per acre or fewer.
- 11 ▪ Percentages of land historically developed in residential use are nearly the same
12 for urban and rural designated areas (39.5% of UGAs and 36.6% of rural areas).

13 These issues provide the challenges for the future of how to:

- 14 ▪ Direct the bulk of growth toward urban areas.
- 15 ▪ Provide greater distinction between urban and rural areas.
- 16 ▪ Guide land use patterns to allow for efficient provision of urban services such as
17 sewers and transportation systems.
- 18 ▪ Preserve open space.

19 The Plan thus acknowledges a historic local development pattern that failed to direct urban
20 growth to urban areas, failed to distinguish urban from rural lands, and failed to provide for
21 efficient urban services.

22 In this context, Petitioners contend the "current local circumstance" which determines the
23 "appropriate urban density" in Kitsap County's unincorporated UGAs must begin with
24 recognition of recent on-the-ground progress achieved by the County in implementing the
25 UGA goals for compact urban development and reduction of sprawl. Petitioners point out
26 that Kitsap's 2002 BLR documented the majority of growth in the County occurring in the
27 rural area, with urban areas developing at only 3.9 du/ac. With prodding from Petitioners,
28 the Board, and the Court,⁴⁸ Kitsap adopted and implemented "reasonable measures" to
29 increase residential development in urban areas. In the 2000 to 2005 period, the County
30
31
32

⁴⁷ 2006 Plan Update, at 2-2

⁴⁸ See *Kitsap County v CPSGMHB*, 138 Wn.App. 863, 876-77, 881, 158 P.3d 638 (2007).

1 began to experience results of its measures, with a shift toward growth within the UGAs.
2 Thus, the FEIS for the 2006 Plan Update documents average achieved densities in UGAs of
3 5.6 du/ac.⁴⁹
4

5 Petitioners argue this trend of actual and increasing residential densities above 5 du/ac is
6 the local circumstance which, in the absence of reliance on an urban bright line, indicates
7 the appropriate urban density for Kitsap's unincorporated UGAs.⁵⁰ The Board concurs. As
8 the remand states, the Board is to focus on local circumstances at this time, recognizing
9 changes to land usage or population.
10

11 The relevant facts are summarized by the *Suquamish Tribe* Court:
12

13 [The County's 1998 Plan] established various urban density levels and a
14 minimum density for the Urban Low and Urban Cluster designations of five
15 dwelling units per acre.... The County's 2002 Buildable Lands Report showed
16 that from 1995 to 2000, urban growth had not occurred at minimum density levels
17 (five dwelling units per acre) established in the 1998 comprehensive plan. The
18 Buildable Lands Report also showed that growth did not occur in accordance
19 with the 1992 Countywide Planning Policies' goal to allocate growth primarily in
20 the urban growth areas (UGAs). In fact, 43 percent of all growth occurred in the
21 UGAs and 57 percent occurred in rural areas. To remedy the inconsistency
22 between actual growth and the projected growth in the UGAs and the rural areas,
23 the County adopted "reasonable measures" in 2004 to remedy the discrepancy.
24 ⁵¹

25 In 2006 we affirmed the Board's order that required the County to take additional
26 steps because the 2002 Buildable Lands Report was inconsistent with the
27 County's planning policies and comprehensive plan, which were then in effect.
28 See *Kitsap County v CPSGMHB*, 138 Wn.App. 863, 876-77, 881, 158 P.3d 638
29 (2007).⁵²
30

31 The 2006 comprehensive plan contained preliminary information, later confirmed
32 in the completed 2007 Buildable Lands Report, showing that the urban/rural
growth rates had changed, so that 57 percent of growth occurred in UGAs and

⁴⁹ 2006 Plan Update at 2-9, pointing out this average was not uniformly achieved in all UGAs.

⁵⁰ Petitioners' Opening Brief on Remand, at 9

⁵¹ 156 Wn.App. at 749

⁵² 156 Wn.App at 749, fn. 2

1 43 percent occurred in rural areas. The Buildable Lands Report also showed the
2 average density for newly permitted developments was 5.6 dwelling units per
3 acre in the UGA's Urban Low Residential zone from 2000 to 2005.⁵³

4 The Court pointed out the Board's 1995 *Bremerton I* ruling that 4du/ac was an appropriate
5 urban density for Kitsap County "cannot provide a bright line rule a decade later."⁵⁴

6 Over time, circumstances can change in a county or in a portion of a county; and,
7 as our Supreme Court has stated, "The update process 'provides the vehicle ...
8 for recognizing changes in land usage or population.'" ⁵⁵

9 The Court's observation is aptly applied to the present case. The Board finds the trend to
10 urban development above the (then) minimum 5 du/ac is the primary local circumstance
11 determining appropriate urban density in 2006 in Kitsap County's unincorporated UGAs.⁵⁶
12

13 The County, however, asserts its reduction of minimum densities from 5 du/ac to 4 du/ac
14 was supported by (a) community desire, (b) provision of a broader range of residential
15 densities and housing types, and (c) coordination and consistency with urban densities in
16 the County's four cities.⁵⁷ The Board reviews each assertion in light of current local
17 circumstances as reflected in the record.
18

19
20 Community Preferences.

21 The County asserts that community vision as expressed in its subarea planning and
22 comprehensive plan public process supported lowering the minimum densities in the urban
23 low residential designation. The County points out that two-thirds of the 41 comment cards
24
25
26
27

28
29 ⁵³ 156 Wn.App. at 750, fn. 3

30 ⁵⁴ 156 Wn.App. at 765

31 ⁵⁵ 156 Wn.App. at 765, citing *Thurston County v WWGMHB*, 164 Wn.2d at 344 (quoting *Gold Star Resorts Inc*
32 *v Futurewise*, 140 Wn.App. 378, 390, 166 P.3d 348 (2006), aff'd in part, rev'd in part on other grounds 167
Wn.2d 723, 222 P.3d 791 (2009).

⁵⁶ The Board observes further that an "appropriate" urban density should be a density that is consistent with
the Goals of the GMA and with the County's comprehensive plan policies; see discussion *infra*.

⁵⁷ FDO, at 12; Kitsap County's Brief on Remand, at 30-31.

1 responding to the question: "Should the range of Urban Low Residential densities be
2 extended to accommodate the four units per acre?" answered yes.⁵⁸

3
4 The Board notes the FEIS refers frequently to "community vision" as grounds for the
5 reduction to 4 du/ac.⁵⁹

6 Citizen groups, such as those in Silverdale and Central Kitsap, have lobbied for
7 residential densities lower than 5 dwelling units per acre to maintain
8 neighborhood character – as low as 3 dwelling units per acre.⁶⁰ In *Bremerton v*
9 *Kitsap County*, October 1995, the Central Puget Sound Growth Management
10 Hearings Board found that, as a general rule, 4 dwelling units per acre addresses
11 GMA requirements specific to Kitsap County and these community desires.

12 Petitioners object that the County has cherry-picked the citizen testimony it prefers. They
13 assert: "Petitioners alone outnumber the Silverdale citizen advisory committee [which
14 lobbied for a lower minimum] and are on record as opposing the urban density reduction."⁶¹
15 Petitioners also point out that citizens' preference for lower density does not trump the
16 requirement for the County to comply with the GMA and be guided by its goals.⁶²

17
18 The Board finds it is not possible at a four-and-a-half year remove to reach a generalized
19 conclusion concerning the public input. The Board finds the record indicates the County
20 conducted a thorough and well-organized public process.⁶³ Having reviewed at length the
21 record of this process documented in the FEIS, the Board does not find evidence of a
22 community consensus to reduce minimum densities. Rather, the Board finds citizens were
23 of divided opinions:
24
25

26 ⁵⁸ County Remand Brief, at 30, referencing FEIS, Appendix A, Public Involvement Summary (Appendix C, 1-
27 11, 2-23, 3-37) reporting on 3 community workshops with 237 participants.

28 ⁵⁹ E.g., FEIS at 5-10, 5-35, 5-78, 5-167

29 ⁶⁰ The Board finds no record of a unique housing pattern in Silverdale that sets "neighborhood character" at 3
du/ac.

30 ⁶¹ Petitioners Opening Brief at 18; see Index 29761; FEIS Ch. 5, Letters 9, 128-129, 221.

31 ⁶² *Id.* at 18, noting the Board has consistently found that local preferences for continuing pre-GMA patterns of
32 low-density development do not trump the Goals of the Act. *Aagaard et al v Bothell*, CPSGMHB Case No. 94-
3-0011c, Final Decision and Order (1995), at 8; *Benaroya et al v City of Redmond*, CPSGMHB Case No. 95-3-
0072c, Final Decision and Order (Mar. 25, 1996), at 21; *Master Builders Association of Pierce County/BRINK v*
Pierce County, CPSGMHB Case No. 02-3-0010, Final Decision and Order (Feb. 4, 2003), at 11-12, 13-14.

⁶³ See generally, FEIS Appendix A.

- 1 ▪ some citizens and citizen groups lobbied for reduced urban densities;⁶⁴
- 2 ▪ other citizens and citizen groups advocated for increased density in urban areas to
- 3 preserve rural character and prevent sprawl;⁶⁵
- 4 ▪ many citizens and citizen groups lobbied to protect streams and other special open
- 5 spaces from urban development;⁶⁶
- 6 ▪ numerous property owners and neighbors advocated for or against specific UGA
- 7 extensions or zoning changes,⁶⁷ and
- 8 ▪ the RWIP and TDR and NASCAR proposals generated high levels of community
- 9 input.

10 The Board concludes there was both support and opposition to the reduction of minimum
11 UL/UC densities. On this mixed record, the Board will not disturb the County's conclusion
12 that reduced density was supported by the Silverdale citizen advisory committee and some
13 other citizens. However, that does not resolve the question whether the County's down-
14 zoning was tailored to local circumstances on the ground.

15 Our Supreme Court has recently pointed out the limitations on County reliance on public
16 testimony about density preferences.⁶⁸ Under the *Kittitas County* ruling, whether public
17 testimony, community council reports, or citizen committee recommendations are to be
18 relied on to support an appropriate urban or rural density depends on whether the testimony
19 speaks to local circumstances that are relevant to GMA standards. In the *Kittitas* case:

20 For example, the community testimony does not address whether a three-acre
21 density designation is consistent with rural character or other issues of GMA
22 compliance but focuses instead on the nonagricultural economic needs of farmers
23 and rural landowners.⁶⁹

24 In the present case, the public comment was too varied and voluminous for the Board to
25 reach any general conclusion. However, the citizen comments supporting the lowered
26 urban minimums do not articulate how that would further the GMA requirements and County
27

28

29 ⁶⁴ E.g., Index 30233 and 30347 (Jack Hamilton); FEIS Ch. 5, Letter 134.

30 ⁶⁵ E.g., these petitioners and others, Index 29761; FEIS Ch. 5, Letters 9, 19, 128-129, 154, 221.

31 ⁶⁶ E.g., in FEIS Ch. 5, Chums of Barker Creek, Letters 192-195; Dyes Inlet Preservation Council, Letters 199-
32 203; Illahee Citizen Group, Letters 209-216; Johnson Creek Ass'n, Letters 217-218.

⁶⁷ 120 individual land use reclassification requests were initiated by landowners, of which 83 were adopted in
 the Plan. FEIS at 2-19. These proposals generated much of the comment documented in FEIS Ch. 5.

⁶⁸ *Kittitas County v EWGMHB*, Supreme Court Case No. 84187-0 (July 28, 2011), Slip Op. at 10.

⁶⁹ *Id.*

1 Plan policies of (1) directing the bulk of growth to urban areas and (2) differentiating urban
2 from rural areas to reduce sprawl and protect rural character.⁷⁰ Moreover, the written record
3 of citizen comment does not provide any specific information about neighborhood character
4 that would support a whole-sale down-zoning. Therefore the Board finds the record of
5 community input fails to identify current local circumstances to support lowering UL/UC
6 minimum densities.
7

8 Range of housing options

9

10 The County contends local circumstances at the time called for an increased range of
11 residential densities to increase housing options. The County asserts that lowering the
12 UL/UC minimum density, while raising maximums in other zones, provided a broader range
13 of housing options in its UGAs. Maximum urban density was raised from 24 to 30 du/ac in
14 Urban High and commercial designations, and a new mixed use zoning designation, also
15 with a 30 du/ac maximum, was added for infill in certain areas.⁷¹ However, while the County
16 increased maximum allowable densities in multi-family zones, these zones constitute just
17 6% of UGA residential lands.⁷² The Petitioners point out the UL/UC designations cover over
18 70% of the unincorporated UGA; they assert the housing capacity lost from lowering the
19 minimums is not offset by the raised maximums in multi-family zones.⁷³
20
21
22
23

24 ⁷⁰ See comment letters cited in County Brief, at 31, fn. 91:

- 25 • Index 30280, Michael Gingerich letter, objecting to medium-density zoned development near Port Orchard because large family homes are on lots too small for play-yards;
- 26 • Index 30347, Jack Hamilton comment – 5 du/ac “not consistent with the desires of the people and contrary to the specific request” of the Central Kitsap Community Council for a 3 du/ac average;
- 27 • Index 30231, Illahee Community comment – Keep 5-9 du/ac zoning where sewer is available, increase mixed zone density along Highway 303, protect open-space/natural resource area with urban restricted [1-4 du/ac] density;
- 28 • Index 30340, Killmer email, objecting to 5 du/ac in Silverdale where neighborhood road has no shoulder for bicycles or joggers.

29 ⁷¹ County Brief at 10; FEIS at 5-17.

30 ⁷² Urban High comprises 327 acres and Urban Medium 989 acres. Petitioners’ Reply, at 39, citing DEIS, at 3.2-34

31 ⁷³ Petitioners’ Brief, at 10 (“The magnitude of this 20% reduction in density, translates to an estimated 2,666 dwellings that could have been but were no longer accommodated within pre-existing UGAs.”)

1 The Washington Department of Community, Trade, and Economic Development (CTED)⁷⁴
2 addressed the “range of housing” concern in its letter of comment on the DEIS and
3 proposed 2006 Plan Update.⁷⁵ CTED points out the way to promote a greater variety of
4 housing types is to increase the supply of land designated for medium and high density
5 residential land use. New areas designated for higher density also increase affordability,
6 according to CTED:
7

8 Designating a supply of land to these [medium and high density] use categories
9 will therefore facilitate development of greater housing opportunities to meet the
10 needs of various segments of the population.⁷⁶

11 The Board is not persuaded the record demonstrates lowering minimums in Urban Low and
12 Urban Cluster designations increases the range of housing options. The Board concurs with
13 Petitioners that a single family residence on a quarter-acre lot is not a different housing type
14 than single family home on a fifth of an acre. The 2006 Plan Update summary of existing
15 land use conditions begins:⁷⁷
16

17 The predominant pattern of residential development throughout the
18 unincorporated areas, including the rural area, is low-density single family.
19 *Almost half of the developed acreage in the designated UGAs has 5 dwelling*
20 *units per acre or fewer.*

21 The option of quarter-acre lots is already provided in the Urban Restricted designation,
22 which constitutes 21% of the County’s residential UGA and allows 1 to 5 du/ac. In sum, the
23 Board finds no basis in the record for the County’s contention that lowering UL/UC minimum
24 densities provides an increased range or greater variety of housing options.
25

26 Consistency with Cities

27 The Board addresses, first, the local circumstances concerning the compatibility of densities
28 in UGAs which may not be identical with zoned densities in adjacent cities. Then, the Board
29

30
31 ⁷⁴ CTED has since been renamed the Department of Commerce. It has some oversight, rule making and
32 coordination authority under the GMA. See RCW 36.70A.050, RCW 36.70A.106, RCW 36.70A.190.

⁷⁵ CTED DEIS comment letter (Oct. 20, 2006).

⁷⁶ CTED DEIS comment letter, at 8.

⁷⁷ 2006 Plan Update, at 2-2, emphasis supplied.

1 looks at allowed densities of the three cities at issue here to determine the local
2 circumstances at the time of the County's UL/UC down-zoning.

3
4 The County and *Amicus* Port Orchard argue that, where cities will ultimately annex UGAs,
5 identical zoned densities are necessary for seamless transition. However, neither the
6 County nor Port Orchard provide any factual evidence that annexation of an area developed
7 at 5 du/ac would be problematic for a city with a zoning minimum of 4 du/ac or, like Port
8 Orchard, 4.5 du/ac.⁷⁸ The minimum densities at issue are all single-family residential zones;
9 no evidence of incompatibility has been presented.⁷⁹
10

11 By contrast, the City of Bremerton provides factual content for an argument of
12 incompatibility when UGA densities are too low for infill and efficient service provision by the
13 associated city. In a comment on the draft Plan, Bremerton objected to the County's
14 approval of certain recent plats in the Central Kitsap UGA, noting they
15

16 are not serviced by sewer and are approved at nearly one unit per acre. Not only
17 does this practice consume valuable capacity for new urban housing, the overall
18 development pattern that it produces insures that the area cannot infill to urban
19 density.⁸⁰
20

21 At the high density end of the scale, Bremerton provided detailed support for its request that
22 high-density zones in the associated UGAs should not be sited adventitiously but should be
23
24
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26

27 ⁷⁸ Port Orchard's *Amicus* Brief (Revised) states (at 5, sic):

28 The four Cities of Kitsap County are responsible for assuming the urban services for their associate UGAs.
29 The Cities planning for infrastructure, zoning, and resource management are necessarily tied closely to the
30 Cities need for predictability with annexations. Differing density standards will result in a development
31 pattern which will be inconsistent with the regulations what will ultimately be imposed by the City. A result
will create confusion and difficulty for the City as well as its citizenry.

32 ⁷⁹ Indeed, given that all land use designations under consideration allow a range, and achieved densities are
almost uniformly greater than the minimums, there hardly seems to be a basis in logic for arguing
incompatibility.

⁸⁰ Index 39013, paragraph CK-7.

1 located consistent with the Bremerton Centers strategy so that services and transportation
2 can be efficiently provided.⁸¹

3
4 No such fact-specific local circumstances have been offered to demonstrate any
5 incompatibility between the County's prior 5 du/ac minimums in its residential low
6 designations and the corresponding residential low minimums in the associated cities -
7 Poulsbo's 4 du/ac RL, Port Orchard's 4.5 du/ac , or Bremerton's 5 du/ac LDR minimums.

8
9 The Central Board has been presented several times with the argument that UGA zoning at
10 higher density is incompatible with lower density in an adjacent city. In *Bothell v Snohomish*
11 *County*,⁸² the cities of Mill Creek and Bothell protested the County's rezoning of lands within
12 their associated UGAs at higher densities than the plans of either city contemplated. The
13 Board dismissed the charge of inter-jurisdictional inconsistency. In *Bothell*, as in the present
14 case, no factual evidence was presented demonstrating that moderate-density single family
15 housing in the UGA would actually thwart eventual service provision by the adjacent city,
16 notwithstanding the cities' 4 du/ac adjacent neighborhoods. By contrast, in *City of Shoreline*
17 *v Snohomish County*⁸³ the Board found the county's proposed Urban Center was
18 inconsistent with an adjacent city's plan where facts in the record demonstrated traffic
19 generated by the 3500-unit Urban Center development would thwart the city's capital
20 development plans, especially its transportation LOS. No such local circumstances appear
21 in this case.⁸⁴
22
23
24
25
26

27
28 ⁸¹ *Id.* paragraph CK-3, CK-4, CK-8, EB-1, WB-3: "We are further impressed that the scattered multi-family
29 housing designations seem to take advantage of available sites rather than expressing a deliberate vision of
30 healthy urban growth."

31 ⁸² CPSGMHB Case No. 07-3-0026c, Final Decision and Order (Sep. 17, 2007), at 29.

32 ⁸³ Coordinated Case Nos. 09-3-0013c and 10-3-0011c, Corrected Final Decision and Order (May 17, 2011), at
36.

⁸⁴ *MT Development LLC v City of Renton*, 140 Wn.App. 422, 165 P.3 427 (2007), while decided on a different
basis, is instructive. The Court ruled Renton could not impose its 4 du/ac zoning standard as a condition of
sewer service extension in the King County UGA beyond city boundaries, where county zoning allowed 8
du/ac.

1 More fundamentally, the record here does not support the conclusion that a 4 du/ac
2 minimum in the adjoining cities was a “current local circumstance” except in Poulsbo, which
3 has the smallest associated UGA.

4
5 Kitsap County has four cities: Bainbridge Island, Bremerton, Port Orchard, and Poulsbo.
6 Bainbridge Island is an island city without an associated UGA. Urban density in Bainbridge
7 Island is therefore irrelevant to determination of compatible urban density minimums in any
8 adjacent UGA.⁸⁵

9
10 **Bremerton** is Kitsap’s largest city, with twice the population of Port Orchard and Poulsbo
11 combined.⁸⁶ UGAs associated with or claimed by Bremerton include West Bremerton, East
12 Bremerton, Gorst, SKIA [Industrial only], and Central Kitsap, for a total of 13,830 acres.⁸⁷
13 Bremerton’s urban low density residential [LDR] designation allows 5 to 10 du/ac.⁸⁸ In
14 calculating its total housing capacity, Bremerton applies an average build-out density in LDR
15 properties of 7.5 du/ac.⁸⁹ While there are exceptions in Bremerton’s plan to accommodate
16 “neighborhood character,” the exceptions go in the direction of allowing smaller lots
17 (therefore more density).⁹⁰

18
19
20 Bremerton’s Comprehensive Plan Land Use Element describes the City’s LDR policies:⁹¹

21 To retain the traditional character of residential districts that are mostly developed,
22 new residential projects should be built at compatible densities. Efficient delivery
23

24 ⁸⁵ Countywide Planning Policies (CPP), Element B.3.b (p. 13): “To maximize the efficient use of urban lands,
25 subdivisions in Urban Growth Areas shall be *consistent with the associated jurisdiction’s* Comprehensive Plan
26 and underlying zoning densities.” Thus the “consistent with cities” argument based on the CPPs does not
27 include Bainbridge Island, nor does it support down-zoning the stand-alone Silverdale and Central Kitsap
UGAs.

28 ⁸⁶ Bremerton’s 2000 population was 37,200. Index 31054, Bremerton Comprehensive Plan at LU App. 5.
29 The Board has not found current population figures for Port Orchard and Poulsbo in the documents proffered
30 and so turns to the 2007 BLR which lists Port Orchard 2000 population 7,693, and 2005 population 8,250;
31 Poulsbo 2000 population 6,813, and 2005 population 7,450. 2007 BLR, at 32, 35.

32 ⁸⁷ UGA gross acreages are taken from 2006 Plan Update, at 2-15 to 2-20. The SKIA UGA is 4700 acres,
leaving Bremerton 9130 gross acres of UGA in primarily residential and commercial designations.

⁸⁸ Index 29762, Memorandum from Bremerton to Kitsap County ULCA Consultant (Sep. 8, 2006) at 1

⁸⁹ *Id.* at 3, 4

⁹⁰ *Id.* at 1 fn. 1, and 2.

⁹¹ Index 31054, LU-47

1 of urban services is best achieved at densities such as those found in West
2 Bremerton.... The average residential density here approaches seven units per
3 acre.

4 In parts of East Bremerton, densities tend to be lower [some lower than 5 units
5 per acre] ...[C]ost efficiencies to maintain services at the levels of service desired
6 by residents depend on densities at least as great as those in the heart of West
7 Bremerton [7du/ac]. Only when accommodating critical area conditions should
8 density in new projects within the LDR designation fall below 5 units per acre.

9 The City of **Port Orchard** is associated with the McCormick Woods UGA (ULID #6) and the
10 South Kitsap subarea plan, for a total of 9,000 acres. Port Orchard's minimum density in its
11 urban low designation is 4.5 du/ac.⁹²

12
13 **Poulsbo** is associated with the Poulsbo UGA, with 850 gross acres in 2006. In 2002,
14 Poulsbo and Kitsap County entered into an agreement that zoned and regulated this UGA
15 identically with Poulsbo's urban low (RL) designation, with 4 du/ac minimums. The Poulsbo
16 Subarea Plan was adopted by Kitsap County in 2002.⁹³
17

18
19
20 ⁹² *Amicus* Brief (Revised) at 5: Port Orchard argues a County designation with a 5 du/ac minimum "will create
21 confusion and difficulty for the City as well as its citizenry" because of the difference from the City's 4.5 du/ac,
22 but that argument doesn't support the County adopting a 4 du/ac minimum *below* the City's 4.5 density floor.
23 ⁹³ Poulsbo's RL density was not challenged until 2010 when Poulsbo updated its comprehensive plan. In *Wold*
24 *et al v City of Poulsbo*, CPSGMHB Case No. 10-3-0005c, Final Decision and Order (Aug. 9, 2010), at 49, the
25 Board ruled:

26 The [2002] Subarea Plan established the boundaries for the Poulsbo UGA and approved the RL
27 zoning designations that would apply both within the city and in the unincorporated UGA. These UGA
28 boundaries and zoning designations were not changed by the [Poulsbo] 2009 Plan. [The UGA
29 boundaries were not expanded in the County's 2006 Comprehensive Plan.] Unlike the flawed County
30 plan that the *Suquamish Tribe* Court has now found non-compliant, the 2009 Poulsbo Comprehensive
31 Plan has not down-zoned its zoning designations nor sought to expand its UGA boundaries. While the
32 zoned minimum density in Poulsbo's RL designation is 4 du/net acre, the City has adopted several
"infill and development maximization measures." As a result, achieved densities of new development
in every zone are higher than the minimums. These achieved densities are not "ignored" in the City's
Plan ..., but rather are relied on in the narrative of the Plan to demonstrate the unlikelihood that UGA
expansion will be needed.

The 2002 Subarea Plan adopted a density "target" of 5 du/net acre for the RL designation. The
achieved densities in the RL district have averaged 6.1 du/net acre, thus more than meeting the 2002
target. Petitioners present no evidence that future developments are less likely to take advantage of
the City's maximization techniques. Rezoning at a higher 'minimum' is not necessary to accommodate
the allocated growth.

1 In sum, the County's action reducing its UL/UC minimums from 5 du/ac to 4 du/ac made its
2 urban low-density minimums identical only with Poulsbo (where the 4 du/ac minimum was
3 already in effect), not with Port Orchard or the much larger Bremerton.⁹⁴ Given the relative
4 size of the UGAs associated with Port Orchard and Bremerton, the Board concludes
5 consistency with cities is a local circumstance that supports retention of a 5 du/ac minimum
6 density.
7

8 This was the conclusion reached by CTED in its DEIS comment letter.⁹⁵ CTED
9 recommended the County maintain the 5 du/ac minimum density, pointing out:
10

11 The existing five du/ac minimum density is more consistent with existing Low
12 Density Residential zones in the cities of Bremerton and Port Orchard.

13 Further, Kitsap has two large free-standing UGAs not associated with any adjacent city –
14 Silverdale (7400 acres) and Kingston (1600 acres). “Consistency with adjacent cities” is not
15 a local circumstance that requires or supports reducing the County's minimum residential
16 densities from 5 du/acre to 4 du/acre in the Silverdale or Kingston UGA.
17

18 Finally, the County and Port Orchard assert that the local vision supports maintaining a
19 “small town character and charm” in the urban areas, so that the projected population will be
20 absorbed primarily in “bedroom communities” with large residential areas at lower densities
21 rather than in concentrations of high-rise multi-family apartments.⁹⁶ Again, the Board does
22 not see how this local vision requires or supports a reduction of County minimum densities
23 from five homes down to four homes per acre.
24

25
26 In sum, the Board finds that a 5 du/ac minimum is more tailored to local circumstances in
27 adjacent cities than 4 du/ac.
28
29

30
31 ⁹⁴ The Board notes the County designations aren't uniform in each of the UGAs. Only the Kingston and
32 ULID#6 UGAs have Urban Cluster zoning, and the Poulsbo RL was set at 4 du/ac in 2002, when the
remainder of the UGAs had a 5 du/ac minimum.

⁹⁵ CTED DEIS Comment, at 3

⁹⁶ County Brief at 19; *Amicus* Brief (Revised) at 3-4

1 The Court's remand asked the Board "to consider whether local circumstances show that
2 four dwelling units per acre is an appropriate urban density in Kitsap County at this time."
3 With full deference to the County's rationale, the Board has not found a record of on-the-
4 ground local circumstances supporting the County's decision.

5
6 **Legal Issue 2 – Internal consistency**

7 ***"We remand to the Board for it to consider whether (2) reducing minimum***
8 ***density is internally consistent with the comprehensive plan goals."***⁹⁷

9
10 Legal Issue 2 is set forth in the Prehearing Order on Remand as follows:

- 11 2. *Did the reduction in permitted urban residential densities result in an internally*
12 *inconsistent plan in violation of RCW 36.70A.070?*

13 **Applicable Law**

14 RCW 36.70A.070 (Preamble), provides in relevant part:

15 "...The plan shall be an internally consistent document and all elements shall
16 be consistent with the future land use map..."
17

18 **Discussion and Analysis**

19 Petitioners argue the density reduction in the Urban Low and Urban Cluster designations
20 directly thwarts the "reasonable measures" and related goals and policies in the 2006 Plan
21 Update, resulting in an internally inconsistent plan. They contend the down-zoning and
22 concomitant UGA expansion thwarts Plan policies directing the County to increase density
23 in the UGAs and provide efficient urban services.⁹⁸
24
25
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27
28 ⁹⁷ 156 Wn.App at 780

29 ⁹⁸ Petitioner's argument was summarized in the FDO, at 12: Between 2000 and 2005, the County has
30 achieved an average density for urban residential plats of 5.6 units /net acre. See Plan Update, at 2-9. The
31 County's Plan appeared to be encouraging increased densities in the urban area. *Id.* Therefore, Petitioners
32 argue, given this trend of increasing urban residential densities and compact urban growth, the County's new
reduction of its minimum densities will cause this trend to be reversed requiring more land to be needed in the
UGA to accommodate projected growth. In addition to adjusting the required densities, Petitioners also argue
that the County has lowered the urban/rural split for accommodating population growth from 83% to 76% for
urban areas and increased from 17% to 24% in rural areas, a modification that is contrary to GMA's mandate
for compact urban growth.

1 Petitioners cite Land Use policies requiring the County to use the Buildable Lands Program
2 to “ensure that urban growth does not occur in the rural area” and to “increase the amount
3 and rate of growth in urban areas.”⁹⁹ They contend a number of Plan policies promote
4 compact development patterns and higher densities within UGAs.¹⁰⁰ They point to Housing
5 Policy HS-21 promoting affordable housing through increased density. Finally, they cite
6 policies calling for “compact development patterns within UGAs” to maximize efficient and
7 cost-effective public infrastructure and services.¹⁰¹
8

9
10 The County’s answer is that all of these policies are satisfied in its 2006 Plan Update,
11 because the Plan directs urban growth to the expanded UGA at densities which are clearly
12 urban (4 du/ac) and readily distinguishable from rural development patterns.¹⁰²
13

14 The Board notes that, under the County’s rationale, policies to ensure that urban growth
15 occurs in the urban, not rural, areas, could be satisfied by continuously expanding the land
16 designated for urban growth and continuously lowering the densities defined as urban, just
17 so long as they remain distinguishable from rural densities. To avoid that outcome, the GMA
18 requires a County to enact “reasonable measures” likely to increase the rate and density of
19 growth in the urban areas “in lieu of expanding the UGA.”¹⁰³ Accordingly, Kitsap’s 2006
20 Plan Update contains a significant commitment to Reasonable Measures.¹⁰⁴ The Board
21 concurs with Petitioners that reducing minimum densities in 70% of the UGA, with
22 concomitant UGA expansion, is inconsistent with the Plan’s reasonable-measures goals and
23 policies.
24
25
26
27

28
29 ⁹⁹ Petitioners’ Opening Brief at 19-20, citing Policy LU-8, LU-9, LU-10, and LU-32 (set forth infra)

30 ¹⁰⁰ *Id.* at 20-21, citing Land Use Goals 6 and 11, Policies LU-20, LU-43, LU-45, and LU-49.

31 ¹⁰¹ *Id.* at 22, citing Policy LU-17, LU-20, and LU-119.

32 ¹⁰² County Brief, at 37, citing County urban zoned density ranges from 4 to 30 du/ac, compared to rural zoned densities of 1 du/5ac, 1du/10ac, and 1 du/20 ac.

¹⁰³ RCW 36.70A.215(1)(b) and (4). This requirement applies where, as here, County on-the-ground development patterns are not meeting the County’s own goals.

¹⁰⁴ 2006 Plan Update, Section 2.2.3 Reasonable Measures (2-9 to 2-11) and FEIS Appendix C.

1 Kitsap County's Reasonable Measures policies were developed through several years of
2 litigation and the County's efforts to comply.¹⁰⁵ As the *Suquamish* Court noted, the County's
3 2002 Buildable Lands Review identified serious discrepancies between the County's target
4 urban densities (5 du/ac) and achieved densities (3.9 du/ac). The County's goals for
5 urban/rural growth split (83%/17%) were also failing; the 2002 BLR showed a 43%
6 urban/57% rural split – less than half the growth going to designated urban areas.
7

8 Notwithstanding the 2002 BLR conclusions, in 2003 Kitsap County expanded several of its
9 urban growth areas.¹⁰⁶ When the 2003 UGA expansions were challenged by some of these
10 same petitioners, the Board ruled: "The BLR identifies inconsistencies, therefore the County
11 must not only identify reasonable measures, but take action to implement them as required
12 by RCW 36.70A.215 (4)."¹⁰⁷
13

14 Accordingly, the County adopted Resolution No. 158-2004 which provided an addendum of
15 "reasonable measures" to the 2002 BLR. Petitioners challenged the resolution, arguing the
16 addendum did not contain any new actions but was merely a summary of previous
17 regulations and not likely to achieve different results. The Board, however, ruled the
18 resolution "constituted threshold compliance with RCW 36.70A.215."¹⁰⁸ On appeal, Thurston
19 County Superior Court reversed the Board's decision, finding the resolution did not
20 constitute a "reasonable measure" to bring actual growth into compliance with growth
21 management plans and policies.¹⁰⁹
22
23
24

25 In 2005, Kitsap County approved an additional expansion of the Kingston UGA. KCRP and
26 Jerry Harless challenged the expansion, arguing, inter alia, that adoption and
27

28 ¹⁰⁵ See, e.g., comment at FEIS 2-14 and 2-15.

29 ¹⁰⁶ ULID #6 (McCormick Woods), South Kitsap Industrial Area (SKIA), Kingston.

30 ¹⁰⁷ *City of Bremerton, Suquamish Tribe, KCRP, Jerry Harless, and Port Gamble S'Klallam Tribe v Kitsap*
County (Bremerton II), CPSGMHB Case No. 04-3-0009c, Final Decision and Order (Aug. 9, 2004), at 54.

31 ¹⁰⁸ *1000 Friends of Washington, KCRP and Jerry Harless v Kitsap County (1000 Friends/KCRP)*, CPSGMHB
Case No. 04-3-0031c, Final Decision and Order (June 28, 2005), at 2.

32 ¹⁰⁹ Thurston County Superior Court No. 04-2-02138-1 (Dec. 22, 2005). This part of the Superior Court ruling
was affirmed by the Court of Appeals subsequent to the County's adoption of its 2006 Plan Update. *Kitsap*
County v CPSGMHB, 138 Wn.App. 863, 158 P.3d 638 (2007)

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1 implementation of reasonable measures was required in lieu of expansion. The Board
2 agreed.¹¹⁰ The Board ruled expansion of the UGA in advance of implementation of
3 reasonable measures did not comply with RCW 36.70A.215.

4
5 Thus, at the time of the County's adoption of the 2006 Plan Update, the County was on
6 notice from both the superior court (with the *1000 Friends* case) and the Board (in *KCRP IV*)
7 that its 2002 growth patterns indicated the need for better strategies to ensure development
8 at urban densities in urban areas, reverse the trend of sprawl in rural areas, and avoid
9 further expansion of UGAs.¹¹¹ In light of these directives, the County engaged in an
10 intensive analysis of "reasonable measures" intended to increase the rate and density of
11 development in its UGAs rather than in rural lands.¹¹² The 2006 Plan Update adopts
12 "reasonable measures" as the third goal of its land use element:
13

14 Goal 3. Enact and implement reasonable measures to ensure that growth in
15 urban areas is consistent with Plan growth targets.

16 The County's Reasonable Measures are detailed in FEIS Appendix C. Appendix C also
17 reports the adopted measures are beginning to take effect. Appendix C documents that
18 approximately 50% (up from the prior 43%) of all new lots in the unincorporated County from
19 2000 to 2005 were within unincorporated UGAs.
20

21
22 ¹¹⁰ *KCRP VI v Kitsap County*, CPSGMHB Case No. 06-3-0007, Final Decision and Order (July 26, 2006), at
23 17-20 (noting that the Thurston County Superior Court order was issued the day after the County's adoption of
the Kingston UGA).

24 ¹¹¹ As stated in the Plan's introductory language to the Land Use chapter, LU 2-2:

25 Key issues related to existing land use conditions in the unincorporated county are summarized as
26 follows:

- 27 • The predominant pattern of residential development throughout the incorporated areas, including the
rural area, is low-density single family. Almost half of the developed acreage in the designated UGAs
28 has 5 dwelling units per acre or fewer.
- 29 • Percentages of land historically developed in residential use are nearly the same for urban and rural
designated areas (39.5% of UGAs and 36.6% of rural areas).

30 These issues provide the challenges for the future of how to:

- 31 • Direct the bulk of growth toward urban areas.
- 32 • Provide greater distinction between urban and rural areas.
- Guide land use patterns to allow for efficient provision of urban services such as sewers and
transportation systems.
- Preserve open space.

¹¹² FEIS, Appendix C
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1 This is an important early indicator of a growing trend towards accommodating a
2 greater share of future growth in urban areas compared to historic rural
3 development activity.¹¹³

4 The report notes achieved densities in the UGAs averaged 5.6 du/acre (up from the prior
5 3.9 du/ac), and thus were consistent with then-minimum zoned densities.¹¹⁴

6
7 The Appendix C report assesses the adopted reasonable measures and indicates:¹¹⁵

8 The County considered other reasonable measures to encourage urban growth
9 and increase UGA development capacity in its 10-year Plan update process.
10 Experience in other “buildable lands” counties that have implemented reasonable
11 measures suggest that those measures most likely to increase UGA capacity (in
12 lieu of UGA expansion), include:

- 13 1. Rezone existing UGA parcels from lower to higher density zones (i.e., up-
14 zones)
- 15 2. Increase allowable densities in urban residential zones
- 16 3. Adopt minimum urban densities/maximum lot sizes in urban residential zones
- 17 4. Adopt density bonus provisions
- 18 5. Targeted capital facility investments

19 In this context, the Reasonable Measures report explains the reduction from 5 du/ac to 4
20 du/ac as the urban low residential minimum “was based on significant public participation”
21 and “is still GMA compliant” citing the Board’s *Bremerton I* decision.¹¹⁶ However, looked at
22 independent of a bright line, the UL/UC density reduction is not consistent with Reasonable
23 Measures which aim to “increase UGA capacity, in lieu of UGA expansion.”

24 On this history, the Board finds *reducing* minimum densities in 70% of the UGA clearly
25 thwarts the intent of the County’s Land Use Element Goal 3 - Reasonable Measures – and
26 related policies.¹¹⁷ Policy LU-9, which calls for evaluating or “increas[ing] the amount or rate
27
28

29
30 ¹¹³ FEIS Appendix C, Kitsap County Evaluation of Reasonable Measures, at 7.

31 ¹¹⁴ FEIS, App. C Overview at C1 and Kitsap County Evaluation of Reasonable Measures, at 7.

32 ¹¹⁵ FEIS, App. C, Kitsap County Evaluation of Reasonable Measures, at 7-8.

¹¹⁶ *Id.* at 8.

¹¹⁷ Goal 3: Enact and implement reasonable measures to ensure that growth in urban areas is consistent with
Plan growth targets.

1 of growth in urban areas” if BLR findings indicate a need “to ensure that urban growth does
2 not occur in rural areas,” is meaningless if it can be satisfied by simply changing the
3 designation of rural land to urban.

4
5 Policy LU-32, which calls for achievement of target densities to be monitored and programs
6 implemented to avoid amending the UGA, means nothing if target densities can simply be
7 lowered as a basis for expanding the UGA.¹¹⁸ Goal 11 and Policy LU-43¹¹⁹ – promoting
8 residential growth in UGAs at higher than rural densities and requiring all new UGA growth
9 to meet established minimums - are meaningless if minimum urban densities can be
10 redefined based on citizen request. Goal 6 and Policy LU-20¹²⁰ – calling for compact urban
11 development patterns differentiated from rural¹²¹ and leading to infrastructure efficiencies -
12 are without content if the UGA can be expanded to accommodate down-zoning.

13
14
15
16
17 Policy LU-8 Use the Buildable Lands Program to help track the type, location, amount and rate of growth in the
18 urban and rural areas. Growth will be evaluated to ensure that it is consistent with Plan assumptions and
19 policies.

20 Policy LU-9 Consider the need, based on the findings of the Buildable Lands Program, to further evaluate or
21 *increase the amount or rate of growth in urban areas*, or to modify the County’s development regulations to
22 ensure that urban growth does not occur in the rural area.

23 Policy LU-10 Adopt and implement reasonable measures if Plan policies result in inconsistencies between
24 achieved and planned densities.

25 ¹¹⁸ Policy LU-32 Monitor and evaluate new development to identify any pattern of significant under-building
26 within various residential zoning classifications. In the event that development is not achieving established
27 target densities, identify and develop a strategy and program for remedying any regulatory problems inhibiting
28 achievement of the established targets. *Do not use failure to achieve target densities as a basis for amending*
29 *the UGAs* until such program has been implemented.

30 ¹¹⁹ Goal 11 Encourage new residential growth to locate within designated UGAs at higher densities than in
31 rural areas.

32 Policy LU-43 Require all new residential development within the UGAs to achieve minimum densities except
where lower densities are appropriate to recognize the presence of critical areas....

¹²⁰ Goal 6 Encourage and reinforce development patterns within UGAs that are distinct from those in rural
areas.

Policy LU-20 Encourage compact development patterns within UGAs, allowing for efficiencies in transportation
and utilities, as well as public and capital facilities.

¹²¹ The Board notes the 2002 BLR indicates development densities in rural unincorporated Kitsap County
averaged approximately 1 du/ac. [BLR at 7-8] The County’s 2006 Plan Update notes that some citizens have
urged UGA minimums be set at 3 du/ac, and the Urban Restricted designation in the UGAs (21% of UGA
residential lands) already allows minimum densities of 1 du/ac. Thus the County’s goals and policies to
differentiate urban and rural areas will not be easily achieved.

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Growth Management Hearings Board

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1 The Board is left with a definite and firm conviction that a mistake has been made. The
2 County had launched a serious and effective effort to increase the rate and density of
3 development in its urban rather than rural areas - an effort reflected throughout the 2006
4 Plan Update. Lowering the UL/UC minimum density created an internal inconsistency in the
5 Plan.
6

7 **Legal Issue 3 – GMA Goals and Oversized UGA**

8 ***“We remand to the Board for it to consider whether (3) reducing minimum***
9 ***density is consistent with the GMA's goals.”¹²²***

10
11 Legal Issue 3 is set forth in the Prehearing Order on Remand as follows:

- 12 3. *Did the reduction of the minimum urban densities allowed inside the UGA result in an*
13 *Urban Growth Area larger than necessary to accommodate the 20-year growth*
14 *projection, inconsistent with RCW 36.70A.020(1) – (4) and (12)?*

15 **Applicable Law**

16 Petitioners allege that the County has not been guided by, nor complied with, five different
17 Goals of the GMA – RCW 36.70A.020 – as follows:
18

- 19 (1) Urban growth. Encourage development in urban areas where adequate
20 public facilities and services exist or can be provided in an efficient
21 manner.
- 22 (2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped
23 land into sprawling, low-density development.
- 24 (3) Transportation. Encourage efficient multimodal transportation systems
25 that are based on regional priorities and coordinated with county and
26 city comprehensive plans.
- 27 (4) Housing. Encourage the availability of affordable housing to all
28 economic segments of the population of this state, promote a variety of
29 residential densities and housing types, and encourage the
30 preservation of existing housing stock.

31
32

¹²² 156 Wn.App at 780.
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(12) Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally-established minimum standards.

Discussion and Analysis

Petitioners argue the County's decision to reduce UL/UC minimum residential densities from 5 du/ac to 4 du/ac ignores the GMA mandate for a compact urban form (as articulated by the combined purpose of Goals 1, 2, and 12) and forces a 35% expansion of UGAs, thereby perpetuating low-density sprawl.¹²³ Petitioners assert the County's rationale is not supported by the GMA's goals for urban density (Goal 1), transportation (Goal 3), affordable housing (Goal 4), and urban facilities and services (Goal 12). Petitioners also contend the expansion of the UGA violates the right-sizing requirement of RCW 36.70A.110.¹²⁴

Reduce Sprawl. As to the goals to reduce sprawl and encourage compact urban development, the County responds that its 4 du/ac minimum is clearly an urban pattern, thus an extension of this zoning is not sprawl.¹²⁵ Petitioners reply that reducing the minimum density caused an un-necessary expansion of the UGA, and this UGA expansion is the sprawl that violates the GMA goal.¹²⁶

The Board recognizes the 2006 Plan Update sought to accommodate 59,628 additional people in unincorporated Kitsap County.¹²⁷ The Board notes the County made three policy changes affecting the capacity of its UGAs. First, the urban/rural allocation was altered. Where previously the County targeted 83% of projected growth to urban and 17% to rural

¹²³ Petitioners' Opening Brief, at 13-16

¹²⁴ See also Legal Issue 1.

¹²⁵ County Response, at 40-41

¹²⁶ Petitioners' Opening Brief, at 24; Reply, at 9.

¹²⁷ The County used OFM projections of growth to 2025, adjusted to a 2005 baseline. FEIS at 2-16

1 areas, with the 2006 Plan Update, the split was 76% urban/24% rural.¹²⁸ Allocating less of
2 the growth to UGAs should have *reduced* the pressure for UGA expansion.

3
4 Second, the County increased the capacity of medium and high density residential areas,
5 raising the top of the highest zones from 24 to 30 du/ac. This should absorb more growth
6 within the existing UGAs. According to the FEIS, the plan “accommodates the targeted
7 population growth primarily by increasing the allowed density within specific portions of the
8 ... UGAs, including increases in the amount of land available for mixed use and infill
9 development.”¹²⁹ However, because the County’s land capacity analysis (LCA) is based
10 only on the *minimum* density in each zone, rather than on projected achieved density, these
11 increases would have only a modest effect on UGA boundary calculations. The County also
12 designated some additional medium and high density lands and created a mixed use zone.
13 New medium, high and mixed use designations accommodated some of the projected
14 growth and reduced the pressure for UGA expansion.
15
16

17 Third, the County reduced its minimum density in the UL/UC lands which make up about
18 70% of its residential UGAs. In Petitioners’ calculation, this reduction translates to an
19 estimated 2,666 dwellings that could have been but were no longer accommodated within
20 preexisting UGAs.¹³⁰ The FEIS states:

22 Capacity for growth is based on minimum densities of each zone. Therefore, the
23 result of the ULCA reflects the new Urban Low Residential and Urban Cluster
24 minimum density of 4 du/ac instead of 5 du/ac. This *reduces the capacity* of the
25 single-family designated areas.¹³¹

26 Thus reducing these minimum densities increased the pressure to expand the UGA. The
27 County makes no rebuttal.¹³²
28
29

30
31 ¹²⁸ Index 29647, CPP at 2-7, Appendix B at b (Ex. D)

32 ¹²⁹ FEIS at 2-36

¹³⁰ Petitioners’ Opening Brief at 10

¹³¹ FEIS at 5-144

¹³² County Brief, at 40 fn. 116

1 The Board finds that Kitsap's reduction of UL/UC minimum densities caused the County to
2 expand its UGAs in order to accommodate the projected population.¹³³ CTED reached the
3 same conclusion:¹³⁴

4 As noted in the DEIS, **reducing the allowed minimum density reduces the**
5 **development capacity of UGAs, which forces the county to designate larger**
6 **UGAs than would be needed with the current density range** (DEIS p. 3.2-87).
7 This is a significant concern because the Land Capacity Analysis uses minimum
8 densities to calculate land supply, and Urban Low is the predominant residential
9 zone in all UGAs.

10 As the Court of Appeals has said:¹³⁵

11 The GMA's goal is to encourage development in areas already characterized by
12 urban development, to encourage conservation of productive agricultural lands,
13 and to reduce urban sprawl.

14 The Board reads the compact urban growth provisions of Goal 1¹³⁶ and the anti-sprawl
15 language of GMA Goal 2¹³⁷ in the context of the GMA requirements to contain and limit the
16 extension of urban growth areas. That is, UGAs are not to be expanded if projected growth
17 can be reasonably accommodated in areas already characterized by urban development.¹³⁸
18 To the extent growth can be contained in existing UGAs through appropriate zoning and
19 "reasonable measures,"¹³⁹ expansion of such UGAs results in the "inappropriate conversion
20 of undeveloped land."¹⁴⁰ This appears to the Board to be consistent with the Supreme
21 Court's *Thurston County* linkage of the size of UGAs with the goal of reducing sprawl: "If the
22 size of a UGA is not limited, rural sprawl could abound."¹⁴¹ The Court noted:
23
24

25
26 ¹³³ The Board acknowledges that *not all* the UGA expansion arose from UL/UC down-zoning. The 2006 Plan
27 Update approved 83 individual applications for land use reclassifications and other amendments. FEIS at 2-29.
28 Some of these approved applications entailed UGA expansion for residential or commercial use.

29 ¹³⁴ CTED Comment letter, at 3, emphasis supplied.

30 ¹³⁵ *Kitsap County v CPSGMHB*, 138 Wn.App. 863, at 873, 158 P.3d 638 (2007).

31 ¹³⁶ RCW 36.70A.020(1) Urban growth. Encourage development in urban areas where adequate public
32 facilities and services exist or can be provided in an efficient manner.

¹³⁷ RCW 36.70A.020(2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land
into sprawling, low-density development.

¹³⁸ RCW 36.70A.110 (3), .130(3), 215

¹³⁹ RCW 36.70A.215 (1)(b), (4)

¹⁴⁰ RCW 36.70A.020(2)

¹⁴¹ 164 Wn.2d at 351.

1 Oversized UGAs are perhaps the most egregious affront to the fundamental
2 GMA policy against urban sprawl, and it is this policy that the UGA requirements,
3 more than any other substantive GMA mandate, are intended to further.¹⁴²

4 Here, the County's reduction of minimum densities in the bulk of its residential UGAs forced
5 the County to designate larger UGAs than would have been needed with its existing density
6 range. As the *Suquamish Tribe* Court stated:
7

8 The effect of the 2006 comprehensive plan was to expand the UGA boundaries
9 by 12.7 square miles: thereby, reducing Kitsap County's rural areas subject to
10 the plan to accommodate the projected growth using these minimum densities.¹⁴³

11 The result was a plan that allowed "inappropriate conversion" of rural land into low-density
12 residential development.

13
14 The Board finds Petitioners have carried their burden in demonstrating the County's
15 reduction of densities and resultant UGA expansion was inconsistent with the compact
16 urban growth and anti-sprawl provisions of GMA Goals 1 and 2.

17
18 Efficient Provision of Urban Services. Goal 1 calls for urban growth to be directed to urban
19 areas where services exist or can be provided efficiently.¹⁴⁴ Goal 3 encourages efficient
20 multimodal transportation systems coordinated with comprehensive plans.¹⁴⁵ Goal 12 calls
21 for adequate urban services and facilities to support development.¹⁴⁶ GMA Goals 1, 3, and
22

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26 ¹⁴² *Thurston County*, 164 Wn.2d at 352, n. 13, citing *Accommodating Growth or Enabling Sprawl? The Role of*
27 *Population Growth Projections in Comprehensive Planning under the Washington State Growth Management*
28 *Act*, 36 Gonz.L.Rev. 73, 105 (2001).

29 ¹⁴³ 156 Wn.App. at 750, fn. 5

30 ¹⁴⁴ RCW 36.70A.020(1) Urban growth. Encourage development in urban areas where adequate public
31 facilities and services exist or can be provided in an efficient manner.

32 ¹⁴⁵ RCW 36.70A.020(3) Transportation. Encourage efficient multimodal transportation systems that are
based on regional priorities and coordinated with county and city comprehensive plans.

¹⁴⁶ RCW 36.70A.020(12) Public facilities and services. Ensure that those public facilities and services
necessary to support development shall be adequate to serve the development at the time the
development is available for occupancy and use without decreasing current service levels below
locally-established minimum standards.

12 are linked in their call for coordinated planning that ensures urban growth is efficiently served by transportation systems and other urban services.¹⁴⁷

In *Fallgatter V and VIII*,¹⁴⁸ the Board explained the interdependence of these goals:

The Growth Management Act, from its inception, was built around the concept of coordinating urban growth with availability of urban infrastructure. Determining that “uncoordinated and unplanned growth” posed a threat to the state and its citizens [RCW 36.70A.010], the Legislature created a framework that requires consistency between urban land use planning and coordinated provision of capital facilities and urban infrastructure. See, e.g., RCW 36.70A.070(3), .110(3). The “urban growth” and “public facilities” goals used to guide local comprehensive plans are cross-referenced. [RCW 36.70A.020(1), (12)]... The goal of an efficient transportation system, coordinated with local comprehensive plans, is equally interrelated. RCW 36.70A.020(3).

Petitioners argue the County’s reduction of residential density in over two thirds of its UGA lands runs directly counter to the GMA call for urban form that allows efficient provision of urban services.¹⁴⁹ In the FDO, the Board acknowledged Petitioners “point to numerous exhibits within the Record, very impressive evidence,¹⁵⁰ which support the notion that higher densities are more cost-effective for jurisdictions when providing services (i.e. water, sewer, public transit) than lower densities.”¹⁵¹ The FDO states: “The Board agrees that there is certainly persuasive evidence providing a solid basis and rationale for increased densities

¹⁴⁷ *Shoreline III and IV v Snohomish County*, Coordinated Case Nos. 09-3-0013c and 10-3-0011c, Corrected Final Decision and Order (May 17, 2011), at 72; see also *KCRP IV v Kitsap County*, CPSGMHB Case No. 06-3-0007, Order Finding Partial Compliance (Mar. 16, 2007), at 16.

¹⁴⁸ *Fallgatter V v City of Sultan*, CPSGMHB Case No. 06-3-0003, Final Decision and Order (June 29, 2006), at 11; *Fallgatter VIII v City of Sultan*, CPSGMHB Case No. 06-3-0034, Final Decision and Order (Feb. 13, 2007), at 14-15.

¹⁴⁹ Petitioners’ Opening Brief, at 15

¹⁵⁰ Exhibit 29761 is a letter from Petitioner Jerry Harless urging retention of the 5 du/ac minimum densities which includes the following attached documents: *Ten Principles for Successful Development Around Transit*, by the Urban Land Institute; *Appropriate Urban Densities in the Central Puget Sound Region: Local Plans, Regional Visions and the Growth Management Act*, by Joseph W. Tovar; *Taking Its Toll: The Hidden Costs of Sprawl in Washington State*, by Patrick Mazza and Eben Fodor; *Higher Density Development – Myth and Fact*, by the Urban Land Institute; *Creating Great Neighborhoods: Density in Your Community*, by the National Association of Realtors; and *The Economics of Conservation Subdivisions – Price Premiums, Improvement Costs and Absorption Rates*, by Rayman Mohamed.

¹⁵¹ FDO at 13

1 and compact urban growth...” Nonetheless, in reliance on its prior approval of 4 du/ac as an
2 urban density, the FDO gave no further consideration to the efficiency argument.

3
4 The County responds that, while the referenced studies and articles document increasing
5 cost of providing services to lower residential densities, none address a proper minimum
6 urban density, and none balance the local circumstances and public opinion that a county
7 must balance in its GMA planning.¹⁵² The County points out that none of the studies
8 concludes 4 du/ac is an inappropriate urban density or constitutes sprawl: indeed, the
9 “higher density” approved as more cost effective in several studies included developments
10 in the 2 to 4 du/ac range.¹⁵³

11
12 The County’s argument misses the point. The Petitioners provided reputable “cost of sprawl”
13 studies, including current analysis specific to Washington State.¹⁵⁴ The studies indicate
14 lower density subdivisions incur higher net per-unit costs to maintain and operate street and
15 utility services than do higher density subdivisions.¹⁵⁵ The County’s action results in a
16 significant extension of homes on quarter-acre lots. This will undoubtedly cost more to serve
17 than a more compact development pattern.

18
19
20 As to the cost of serving an extended UGA, CTED had these comments to the DEIS:¹⁵⁶

21 We recommend the county maintain the minimum density of five du/acre for the
22 following reasons:

- 23
24 ▪ Reducing minimum densities seems inconsistent with the overall vision of the
25 comprehensive plan, captured concisely in Policy LU-20, to “encourage compact
26 development patterns, allowing for efficiencies in transportation and utilities.”

27
28
29
30 ¹⁵² County Brief, at 32

31 ¹⁵³ County Brief at 32-35

32 ¹⁵⁴ Index 29761, Ex.H, Mazza and Fodor: *Taking its Toll, The Hidden Costs of Sprawl in Washington State*

¹⁵⁵ See, e.g., Index 29761, Ex. L, *The Fiscal Impacts of Alternative Single Family Housing Densities: Infrastructure Costs.*

¹⁵⁶ CTED DEIS Comment letter, at 3
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- 1 ▪ Higher densities of development *help to reduce the per-unit cost of providing*
2 *urban services* such as water, sewer, roads and emergency services, and
3 provide opportunities for more affordable housing.

4 Focusing on the Port Orchard/South Kitsap UGA extension, CTED noted “significant
5 infrastructure and service challenges to expansion of the UGA, including sewer, pedestrian
6 and bicycle improvements, parks and water distribution.”¹⁵⁷ CTED advised:

7 The larger the UGA, the greater the financial costs, not only to build them, but
8 also to maintain them. The needs in these new urban areas will compete with the
9 need to maintain the infrastructure in the existing urban areas. This is another
10 reason why the county’s long term financial sustainability is best served with a
11 more compact development pattern.¹⁵⁸

12 Our Supreme Court has recently clarified the importance of local data in response to GMA
13 challenges which rely on generalized academic studies. In *Kittitas County v EWGMHB*,¹⁵⁹
14 the Court considered a Board ruling on rural density that had been “framed from the outset
15 as a bright line question.” The Court found that in proceedings before the Board, Petitioners
16 “presented sparse local data to the Board and instead focused mostly on studies of land use
17 in other counties and states, academic articles, and density decisions in other jurisdictions.
18 [The County] responded with little relevant local information.” The Court pointed out that the
19 community input on which the County relied did not address the applicable GMA criteria.

20 The County, however, fails to explain how three-acre rural designations, while
21 responsive to identified community concerns, also protect rural areas. As a
22 result, it is unclear how three-acre rural density designations are appropriate in
23 the County’s rural area, when there is substantial evidence that they are harmful
24 to rural areas in other communities.¹⁶⁰

25 The Court remanded the matter to the Board, saying: “While parties that challenge county
26 planning decisions bear the burden to show that a county erred in planning, *counties have*
27 *some responsibility to assure that local data is considered by the Board.*”¹⁶¹
28

29
30
31 ¹⁵⁷ CTED DEIS comment letter, at 10-11, emphasis supplied

32 ¹⁵⁸ *Id.*

¹⁵⁹ Supreme Court No. 84187-0 (July 28, 2011), Slip Op. at 15-16

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 16, emphasis supplied

1 The County here argues that none of Petitioners' studies demonstrate that 4 du/ac is **not** an
2 appropriate urban density. However, the County provides no local circumstances showing
3 that reducing urban minimum density, with the concomitant UGA expansion, still allows
4 efficient infrastructure provision.
5

6
7 Indeed, this case has itself demonstrated the contrary. The Board need only look to the
8 compliance phase of this case to be persuaded that Kitsap's UGA extensions had costly
9 infrastructure ramifications. In the FDO, the Board concluded the County's capital facilities
10 planning for sewer service was inadequate to serve existing urban areas as well as the
11 expansion areas.¹⁶² The County undertook a major planning effort over the next year to
12 articulate fully the sewer service plans for all of its UGAs, and the Board eventually found
13 compliance.¹⁶³ Thus, while Petitioners' academic studies and articles about the costs of
14 sprawl and the efficiency of compact urban development do not prove that Kitsap must
15 adopt a particular level of urban density, the County's capital facilities process in the case
16 before us demonstrates the "on-the-ground" cost of planning to serve, and serving, a
17 significant extension of lower-density urban development.¹⁶⁴
18
19

20 The Board concludes the County's reduction of urban densities and concomitant UGA
21 expansion was not guided by the Goal 1 principle of compact urban development and
22 efficient urban service provision.
23

24 As to Goal 12, however, the Board finds Petitioners have raised no facts or arguments
25 challenging the County's plan to provide capital facilities and public services to serve urban
26
27

28
29
30 ¹⁶²The FDO identified deficiencies in sewer service plans for the Silverdale, Central Kitsap, Gorst, Port
31 Orchard, and West Bremerton UGAs. FDO at 20-26. The FDO stated: "While the Board's analysis has focused
32 on sewer services, other capital facilities may be similarly deficient in providing service to existing residents in
the UGA." *Id.* at 26.

¹⁶³ Order Finding Compliance (June 5, 2008)

¹⁶⁴ The Board has not gone back into the file to review documentation of the projected costs of the sewer
service expansions.

development, other than the sewer-service deficiencies.¹⁶⁵ Goal 12 addresses adequacy and timeliness of service provision, not cost or efficiency. The County has adopted a compliant sewer service plan, and no other challenge to its public facilities and services planning is before the Board. The Board concludes Petitioners have failed to carry their burden of demonstrating the County's action was inconsistent with Goal 12.

Transportation. The GMA transportation goal calls for "efficient multimodal transportation systems" coordinated with land use plans. Relying on the "cost of sprawl" studies, Petitioners contend the County plan "will result in more costly and less-efficient provision of the transportation ... facilities necessary to support urban growth."¹⁶⁶

The County does not attempt to rebut this argument as regards roads and sidewalks. The Board finds data in the FEIS suggesting a correlation between UGA expansion and County projected roadway segment and intersection deficiencies.¹⁶⁷ Petitioners have not brought forward these facts, however, nor have they alleged the County's plan fails to meet the transportation planning requirements of RCW 36.70A.070(6).

The County points to a strong record of support for transit in the 2006 Plan Update.¹⁶⁸ The County references a letter from Kitsap Transit,¹⁶⁹ discussing how the proposed plan, with

¹⁶⁵ County Brief, at 39, fn. 113

¹⁶⁶ Petitioner Opening Brief, at 17.

¹⁶⁷ FEIS 3.2-21 provides a Table of Projected Roadway Segment Deficiencies by 2025, and 3.2-22 provides a Table of Projected Intersection Deficiencies by 2025. These provide data which roughly correlates with UGA size (therefore vehicle-miles-traveled) for the alternatives studied:

	Alternative 1	Alternative 2	Alternative 3
UGA Size (FEIS 1-10)	38.4 square miles	51.8 square miles	57.6 square miles
Deficient Lane-Miles	75.6 lane-miles	91.3 lane-miles	120.6 lane-miles
Deficient Lane-Miles	11.7%	14.1%	18.6%
Intersection at LOS E/F	9	11	16

¹⁶⁸ County Brief, at 31-33

¹⁶⁹ Index #29733

1 higher densities on transit lines and the new mixed-use development zoning, will support
2 more transit services in the future. The FEIS states:¹⁷⁰

3 The County allows higher densities in commercial and mixed use zones (e.g.,
4 minimum 10 du/ac) which are typically along major routes and in centers where
5 transit service is available or more readily provided. In addition, Kitsap Transit
6 has planned for all UGA land to be in its primary service area.

7 Thus the Board finds the increase of maximum medium/high densities and the provision of
8 mixed-use zoning in the 2006 Plan Update provides support for transit services consistent
9 with the GMA transportation goal. On this record, the Board concludes the County was
10 guided by the GMA goal for efficient multimodal transportation.
11

12 Affordable Housing. The GMA's housing goal provides:

13 (4) Housing. Encourage the availability of affordable housing to all
14 economic segments of the population of this state, promote a variety of
15 residential densities and housing types, and encourage the
16 preservation of existing housing stock.

17 Petitioners argue the County's reduction of minimum housing densities in the UL/UC
18 designations does not support housing affordability because larger lot sizes not only
19 increase the per-unit land costs but increase per-unit costs of roads and capital facilities,
20 which are passed on to some extent through increased home prices.¹⁷¹ In response, the
21 County asserts one of its objectives, in allowing lower minimums, was to increase the range
22 of allowable densities, thus "promot[ing] a variety of residential densities and housing
23 types."
24
25

26 The Board reads the GMA housing goal in tandem with the requirements for the housing
27 element of a comprehensive plan.¹⁷² The focus of both the housing goal and the housing
28

29
30 ¹⁷⁰ FEIS at 5-74

31 ¹⁷¹ Petitioners' Opening Brief, at 15, relying on academic studies in the record.

32 ¹⁷² RCW 36.70A.070(2) requires:

 (2) A housing element ensuring the vitality and character of established
 residential neighborhoods that: (a) Includes an inventory and analysis of
 existing and projected housing needs that identifies the number of housing units

1 element appears to be on sufficient land supply for housing and a range of options that
2 make “adequate provision for existing and projected need of all segments of the
3 community.”
4

5 Nothing in the record before the Board suggests that increasing the number of quarter-acre
6 lots for single-family housing provides for a special need of a particular segment of the
7 community. The Board notes the County’s extensive Urban Restricted (UR) zoning – 21% of
8 residential UGA lands - provides for home lots ranging from one acre to a fifth of an acre.
9 Petitioners also point out the considerable backlog of non-conforming lots – too small in the
10 rural area and too large in the urban area – which are available in Kitsap County.¹⁷³ The
11 Board is not persuaded that additional large-lot urban zoning is called for by any local
12 circumstance related to availability of varied housing types.¹⁷⁴
13
14

15 More importantly, large-lot zoning and UGA expansion runs counter to the housing
16 affordability objective. As CTED’s DEIS comment letter points out, housing affordability
17 would call for expansion of areas designated Urban High and Urban Medium residential, not
18 more large-lot single family zoning. Speaking to the South Kitsap Subarea Plan, CTED
19 said:¹⁷⁵
20
21

22 necessary to manage projected growth; (b) includes a statement of goals,
23 policies, objectives, and mandatory provisions for the preservation,
24 improvement, and development of housing, including single-family residences; (c)
25 identifies sufficient land for housing, including, but not limited to,
26 government-assisted housing, housing for low-income families, manufactured
27 housing, multifamily housing, and group homes and foster care facilities; and
28 (d) makes adequate provisions for existing and projected needs of all economic
29 segments of the community.

30 ¹⁷³ None of the parties has quantified the legacy-lot backlog for the Board – or pointed out where the
31 information may be found in the record. The Board notes the 2002 BLR indicates development densities in
32 rural unincorporated Kitsap County averaged approximately 1 du/ac. [BLR at 7-8] The FEIS, at 5-135,
indicates the 2002 BLR documents “...a central issue concerning rural development is that much of it occurs
on [already platted] parcels that are smaller than the prescribed density standard... Until these ... ‘legacy lots’
are fully absorbed, the County may face some obstacles in its efforts to direct most of the new growth towards
urban areas.” Thus, distinguishing rural and urban areas is a continuing concern in Kitsap County.

¹⁷⁴ The Board has previously noted the Plan’s acknowledgement that “almost half of the developed acreage in
the designated UGAs has 5 dwelling units per acre or fewer.” 2006 Plan Update at 2-2.

¹⁷⁵ CTED DEIS Comment letter, at 8-9

1 60 to 70 percent of the area proposed for expansion is Residential Urban Low
2 [UL and UC] designation, at least doubling existing acreage.... This proposed
3 pattern of development appears to conflict with many subarea plan goals,
4 including: Goal LU-3 to promote a compact land use pattern; Goal LU-4 to
5 encourage land use patterns that promote convenient multimodal access and
6 reduce auto dependency; and Goal H-2 to promote a variety of housing types.

7 ...

8 The lack of new areas designated High and Medium appears to conflict with Goal
9 H-1 to encourage affordable housing, as well as Goal H-2 to promote a variety of
10 housing types throughout the subarea. ... The plan states that "a greater variety
11 of housing types can be built under medium and high density residential land use
12 designations...." so "designating an adequate supply of land to these use
13 categories [medium and high] will therefore facilitate development of greater
14 housing opportunities to meet the needs of various segments of the population."

15 The record does not support the County's assertion that reduced UL/UC densities broaden
16 housing options or increase affordable housing. Nevertheless, the Board recognizes the
17 2006 Plan Update included other actions clearly guided by GMA Goal 4 - Housing.¹⁷⁶ By
18 creating new mixed use zoning, the Plan increased the variety of housing types and
19 opportunities. Maximum densities were raised in the Urban High and Commercial
20 designations, providing possibilities for affordability. The Plan provided that 25% of new
21 dwellings be multi-family.¹⁷⁷

22 The Board concludes: although the County's reduction of urban low density minimums was
23 not consistent with GMA Goal 4, the County has demonstrated its 2006 Plan Update was in
24 other respects guided by Goal 4.

25 **Conclusion – Minimum Densities**

26 In view of the entire record before the Board and in light of the goals and requirements of
27 the GMA, the Board finds and concludes as follows:
28
29
30
31
32

¹⁷⁶ See generally, County Brief at 10

¹⁷⁷ FEIS at 5-17

- The Board finds a divided record of community support/opposition for reduced densities and defers to the County's overall assessment of public opinion. However, the public comment, as provided in the FEIS and the County's submissions, does not articulate local circumstances supporting county-wide down-zoning.
- The record does not support the County's assertion that reduced UL/UC densities broaden housing options or increase affordable housing; nevertheless the 2006 Plan Update included other actions clearly guided by GMA Goal 4 - Housing.
- The evidence in the record demonstrates the County's reduction of minimum densities reduced consistency with densities in associated cities, rather than increasing consistencies.
- Review of the whole record indicates the minimum density reductions create an internal inconsistency in the 2006 Plan Update by thwarting the intent of the Plan's Reasonable Measures goal and policies.
- The minimum density reduction caused expansion of the UGA substantially beyond what would otherwise have been necessary to accommodate projected population and therefore was non-compliant with RCW 36.70A.110 and not guided by GMA Goals 1 and 2.
- Viewing the entire record in this case, the Board finds the minimum density reductions and concomitant UGA expansion created inefficiencies in the provision of urban facilities and services, particularly sewer service, and thus were not guided by GMA Goal 1.
- Petitioners failed to demonstrate the minimum density reductions interfere with GMA Goal 3 to encourage multimodal transportation or GMA Goal 12 to provide public facilities and services.

The Board therefore determines the County's action is "clearly erroneous in view of the entire record before the board and in light of the goals and requirements of the GMA." RCW 36.70A.320(3). The reduced density of 4 du/ac is not an appropriate urban density to provide a floor for Kitsap County's UGAs based on local circumstances at the time of the

2006 Plan Update. The Board is left with a definite and firm conviction that a mistake has been made.

Findings and conclusions in the August 17, 2007, FDO based on a bright line density or contrary to the Board's findings and conclusions set forth above are **reversed**.

C. LEGAL ISSUES 4-6

- Land Capacity Analysis

Legal Issue 4 – Double-dipping

“We remand for the Board to decide, based on current local circumstances, and without reliance on the four dwelling unit per acre bright line rule, whether the County “double-dipped.”¹⁷⁸

Legal Issue 4 is set forth in the Prehearing Order on Remand as follows:

- Did the County err in its urban Land Capacity Analysis (RCW 36.70A.110) by accounting for environmentally critical areas twice in the Urban Restricted designation by both designating these lands for very low density and also subtracting them from the tabulation of available lands, i.e. “double-dipping?”*

Discussion and Analysis

In reviewing the Board's FDO, the Court of Appeals concluded:¹⁷⁹

The Board again based its approval of the minimum density on its unacceptable bright line rule.... Furthermore, even if the density of four dwelling units per acre was an appropriate urban density, the Board ... ignored the [Petitioners'] argument about the County “double-dipp[ing].”

The question was therefore remanded.¹⁸⁰

The County's Urban Restricted Residential (UR) designation is applied to lands having 50% or more environmentally-critical areas. These UR lands are zoned with the lowest urban residential densities – 1-5 du/ac – to reduce development pressure and impacts on these

¹⁷⁸ 156 Wn.App. at 781

¹⁷⁹ *Id.*

¹⁸⁰ FDO at 16-17 notes this issue but provides no analysis or findings.

1 sensitive areas.¹⁸¹

2
3 Petitioners argue that the County, in computing the capacity of the UGAs to accommodate
4 population growth, improperly applied a double discount for environmentally-constrained
5 lands in the UR designation, both using the much lower zoned density minimum (1 du/ac)
6 designed to protect critical areas and also deducting the mapped critical areas from the
7 available land.¹⁸² Discounting twice for the protection of critical areas in UR zones resulted
8 in UGAs oversized for growth, according to Petitioners. Petitioners urge the “high and dry”
9 lands – 427 acres after critical areas are subtracted - must be subject to a higher capacity
10 multiplier than the minimum 1 du/ac adopted for critical areas protection.¹⁸³

11
12 The County responds that the zoning designation is “a totally different process than a land
13 capacity analysis,” and Petitioners have confused the procedures.¹⁸⁴

14
15 Although the GMA does not define the components of a land capacity analysis, the
16 Supreme Court in *Thurston County* stressed that the formula used by a county should not
17 result in an oversized UGA.¹⁸⁵ The law review article cited by the Court describes
18 impermissible double-discounting:

19
20 When calculations used to determine net acreage are unclear or inconsistent, the
21 concern is often raised that some parcels are being deducted from gross acreage
22 more than once, a practice referred to colloquially as “double-dipping.”¹⁸⁶

23 Thus, for example, the Board in *Petree v Whatcom County*¹⁸⁷ determined that Whatcom
24 County “double-dipped” when it used a market factor to discount its available land acreage
25

26
27 ¹⁸¹ 2006 Plan Update, at 2-21

28 ¹⁸² Petitioners’ Opening Brief at 26-27

29 ¹⁸³ *Id.* at 28

30 ¹⁸⁴ County Brief, at 49-50

31 ¹⁸⁵ 164 Wn.2d at 351-52

32 ¹⁸⁶ See generally, discussion of “double-dipping” in land capacity analysis, in *Accommodating Growth or Enabling Sprawl? The Role of Population Growth Projections in Comprehensive Planning under the Washington State Growth Management Act*, 36 Gonz.L.Rev. 73, 105 (2001), citing *City of Bremerton, et al v Kitsap County (Bremerton I)*, CPSGMHB Case No.95-3-0039, Final Decision and Order (Oct. 6, 1995), at 61; *Achen v Clark County*, WWGMHB Case No. 95-2-0067, Final Decision and Order (Sep. 20, 1995).

¹⁸⁷ WWGMHB Case No. 08-2-0021c, Final Decision and Order (Oct. 13, 2008), at 17.

1 and then also discounted by an additional percentage for “local circumstances.” The Board
2 noted that the GMA specifies: “In determining this market factor, cities and counties may
3 consider local circumstances.”¹⁸⁸ If local circumstances are to be considered in determining
4 the market factor, adding a separate “local circumstances” discount is impermissible double-
5 dipping, the *Petree* Board concluded.
6

7 In Kitsap County, the UR designation is a very-low density urban designation in lands where
8 a high-degree of environmentally critical areas (more than 50%) is a constraint on capacity
9 for development. Permitted densities are just 1-5 du/ac. In addition to using the much lower
10 density when calculating the capacity of constrained lands, the County’s land capacity
11 analysis (LCA) also subtracts mapped critical areas from the available land supply in all
12 urban designations. In the UR lands, because wetlands, unstable slopes, and the like are
13 already excluded from the calculation, the unusually low density is actually applied only to
14 the “high and dry” remainder which is not constrained. The result is that the LCA discounts
15 land capacity twice for environmental protection, resulting in UGAs which are oversized for
16 the forecast growth.
17
18

19 In fact, the purchaser of a 20-acre property with all but 5 acres constrained would be entitled
20 to build between five units and 25 units (1-5 du/ac x 5 ac). If the critical areas are ignored in
21 the LCA and minimum density is used as the capacity multiplier, the property will be
22 presumed to have capacity for 1 du/ac x 20 ac = 20 homes. If the critical areas are
23 deducted, as required in the County’s methodology, and minimum density is used as the
24 multiplier, the LCA will calculate 1 du/ac x 5 ac = 5 homes. The reduced capacity is a result
25 of essentially discounting twice for protection of critical areas. That is, the County first
26 deducts the critical area acreage and then, in addition, applies a significantly lower density
27 multiplier.
28
29
30
31
32

¹⁸⁸ RCW 36.70A.110(2)
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1 The Board appreciates the County's insistence that a land capacity analysis and zoning
2 regulations have different functions. In this instance, however, the County's application of a
3 zoning minimum to the LCA formulation after critical areas are already discounted is a
4 "double-dip" that understates the actual capacity for development of UR-designated lands.

6 Conclusion

7
8 The Board finds and concludes the County's LCA for UR-designated lands discounted twice
9 for the protection of critical areas and so failed to comply with the requirement to determine
10 capacity to accommodate urban growth.

11 Legal Issues 5 and 6 - Land Capacity Analysis – Minimum Density

12
13 ***"If local circumstances support a minimum urban density of four dwelling***
14 ***units per acre, the Board must also decide whether the County creates***
15 ***inconsistencies with the GMA's goals, the Buildable Lands Report, and the***
16 ***plan when it uses such a minimum density in the land capacity analysis."***¹⁸⁹

17 Legal Issues 5 and 6 are set forth in the Prehearing Order on Remand as follows:

- 18 5. *In the urban Land Capacity Analysis, is the use of four dwelling units per acre as a*
19 *uniform assumption for new urban development inside the UGA inconsistent with*
20 *local circumstances (and thus inconsistent with RCW 36.70A.110 and 215),*
21 *inconsistent with RCW 36.70A.020 (1) – (4) and (12), and inconsistent with the*
22 *County's comprehensive plan (and thus inconsistent with RCW 36.70A.070)?*
- 23 6. *Did the use of minimum urban density in the Urban Land Capacity Analysis result in*
24 *an Urban Growth Area larger than necessary to accommodate the 20-year growth*
25 *projection inconsistent with Goals 1 – 4 and 12 of the GMA?*

26 Applicable Law

27 RCW 36.70A.110, provides in relevant part:

- 28 (1) Each county that is required or chooses to plan under RCW 36.70A.040
29 shall designate an urban growth area or areas within which urban growth
30 shall be encouraged and outside of which growth can only occur if it not
31 urban in nature.

32
¹⁸⁹ 156 Wn.App. at 781

1
2 (2) Based upon the growth management population projection made for the
3 county by the office of financial management, the county and each city
4 within the county shall include areas and densities sufficient to permit the
5 urban growth that is projected to occur in the county or city for the
6 succeeding twenty-year period. . .

7 Each urban growth area shall permit urban densities An urban growth
8 area determination may include a reasonable land market supply factor
9 and shall permit a range of urban densities and uses. In determining this
10 market factor, cities and counties may consider local circumstances. Cities
11 and counties have discretion in their comprehensive plans to make many
12 choices about accommodating growth.

13 (6) Each county shall include designations of urban growth areas in its
14 comprehensive plan.

15 (7) An urban growth area designated in accordance with this section may
16 include within its boundaries urban service areas or potential annexation
17 areas designated for specific cities or towns within the county.

18 RCW 36.70A.130(3) establishes the required ten-year review of UGAs:

19 (a) Each county that designates urban growth areas under RCW 36.70A.110
20 shall review, at least every ten years, its designated urban growth area or areas,
21 and the densities permitted within both the incorporated and unincorporated
22 portions of each urban growth area. In conjunction with this review by the county,
23 each city located within an urban growth area shall review the densities permitted
24 within its boundaries, and the extent to which the urban growth occurring within
25 the county has located within each city and the unincorporated portions of the
26 urban growth areas.

27 (b) The county comprehensive plan designating urban growth areas, and the
28 densities permitted in the urban growth areas by the comprehensive plans of the
29 county and each city located within the urban growth areas, shall be revised to
30 accommodate the urban growth projected to occur in the county for the
31 succeeding twenty-year period.
32

1 RCW 36.70A.215 prescribes a review and evaluation program that produces a Buildable
2 Lands Report every five years. The purpose of the review and evaluation program is to:¹⁹⁰

- 3 a) Determine whether a county and its cities are achieving urban densities within
4 urban growth areas by comparing growth and development assumptions, targets,
5 and objectives contained in the countywide planning policies and the county and
6 city comprehensive plans with actual growth and development that has occurred
7 in the county and its cities; and
8 b) Identify reasonable measures, *other than adjusting urban growth areas*, that will
9 be taken to comply with this chapter.

10 Discussion and Analysis

11 The *Suquamish* Court's remand specified that, if the Board determined local circumstances
12 support the County's reduction of its UL/UC minimum densities to 4 du/ac, the Board should
13 also determine whether the use of that minimum density in the LCA would be inconsistent
14 with the GMAs goals, the Buildable Lands Report and the 2006 Plan Update. The Board
15 has determined reduction of densities to 4 du/ac is **not** supported by local circumstances or
16 consistent with the 2006 Plan Update or GMA goals. Nevertheless, mindful of the Court's
17 injunction to decide all issues,¹⁹¹ the Board addresses the County's use of 4 du/ac as a
18 capacity multiplier in the LCA.
19
20

21 County Uniform Land Capacity Analysis Methodology – ULCA

22 Kitsap County developed a land capacity analysis methodology jointly with its cities.¹⁹² The
23 CPPs include specific policies regarding land capacity analysis:¹⁹³
24

- 25 a) The County and the Cities shall maintain a Land Capacity Analysis Program to
26 monitor land supply and trends for residential, commercial and industrial lands to
27 determine the success of implementation of their respective comprehensive
28 plans. This Program is intended to fulfill the State requirement for a Buildable
29 Lands Program.
30

31 ¹⁹⁰ RCW 36.70A.215(1) emphasis supplied

32 ¹⁹¹ 156 Wn.App. at 775-781

¹⁹² County Brief, at 40-41

¹⁹³ CPP, Element B.1 (page 9)

- 1 b) The County and the Cities shall participate in the Land Capacity Analysis using a
2 consistent methodology for review and evaluation.

3 The agreed-upon land capacity analysis (ULCA) was as follows:

- 4 • Determine gross acreage of vacant and underutilized parcels by zone
5 designation.
6 • Deduct identified critical areas¹⁹⁴ and allowances for roads, rights-of-way,
7 schools, parks and other public facilities.
8 • Deduct a market factor of 5% for vacant lands and 15% for underutilized lands.¹⁹⁵
9 • Calculate net buildable acreage in each zone.
10 • *Multiply net buildable acres by minimum housing density in each zoning*
11 *designation to determine dwelling unit capacity.*
12 • Multiply by average household size (2.5 persons per household) to determine
total population capacity.

13 Petitioners here challenge only the County's use of minimum density in the UL/UC zones as
14 the multiplier for determining capacity.¹⁹⁶ Petitioners point out that it defies logic to predict all
15 subdivisions will be at the minimum density when the zone may allow twice as many homes
16 per acre, as in the UL/UC designations with 4-9 du/ac zoning. Further, Petitioners contend
17 using the minimum as a multiplier is contrary to local circumstances, which demonstrate
18 achieved densities beyond the minimums in the UGAs and in all three associated cities.¹⁹⁷
19

20
21 ¹⁹⁴ Kitsap County uses actual mapped critical areas, rather than a percentage deduction.

22 ¹⁹⁵ The Board notes this is a tight market factor, compared to other Central Puget Sound and Western
Washington counties. The 5% market factor reflects high demand for Kitsap County residential lands.

23 ¹⁹⁶ Petitioners do not here challenge any other components of the ULCA. The Board notes the use of minimum
24 density as the ULCA multiplier was raised in the compliance phase of Petitioners' challenge to the Kingston
Plan. In that proceeding, the Board's ruling on the issue was framed in terms of the 4 du/ac bright line
25 standard:

26 Petitioners contend that the LCA is still non-compliant because the County substituted for the sewer-
27 constrained-lands deduction an urban density calculation lower than its actual average achieved
28 densities. Petitioners' concern, however logical, does not appear to be grounded in any requirement of
the GMA. Petitioners fail to cite to any statutory provision or case law for the proposition that UGA
expansions to accommodate new population allocations must be measured against actual achieved
densities. The parties here do not dispute that a density of 4 du/ac is urban.

29 *KCRP and Harless v Kitsap County (KCRP IV)*, CPSGMHB Case No. 06-3-0007, Order of Partial Compliance
30 (Mar. 16, 2007), at 9.

31 ¹⁹⁷ Petitioners' Opening Brief, at 35-36. Petitioners note the achieved net densities in the residential low-
density zones for the associated cities from 2000 to 2005 were

- 32 • Bremerton 9.4 du/ac with plan density at 5
• Port Orchard 6.1 du/ac with RL plan density range of 4-7
• Poulsbo 6.6 du/ac with plan density at 4.5

1 Finally, Petitioners assert using the minimums leads to an oversized UGA, contrary to the
2 requirements of RCW 36.70A.110 and the GMA Goals.

3
4 The County, while agreeing the achieved densities will necessarily be higher than
5 minimums, contends using minimum densities in a land capacity analysis ensures the
6 capacity is available, as that is the density the County can actually require.¹⁹⁸ Secondly, the
7 County asserts use of a city's minimum in the associated UGA ensures consistent
8 regulations when the area is annexed.¹⁹⁹
9

10 The Court on remand instructs the Board, if it finds local circumstances support the UL/UC
11 downzone, to determine whether the County's use of a 4 du/ac density in its LCA creates
12 inconsistencies with the GMA's goals, the Buildable Lands Report, and the plan.²⁰⁰ That is,
13 the Court asks whether the zoning floor that may constitute "appropriate urban density" is
14 the right multiplier for determining capacity of the UGAs. The remand is reflected in
15 Petitioners' Legal Issue 5, alleging the LCA is inconsistent with local circumstances and thus
16 fails to comply with .110 and .215, and Legal Issue 6, alleging the flawed LCA results in an
17 oversized UGA in violation of GMA Goals.
18
19

20 Local Circumstances

21 At the outset, the Board understands the land capacity analysis is intended to provide the
22 information needed to right-size the UGA to accommodate a projected population. As the
23 GMA Guidelines explain:
24
25

26 2007 BLR at 29, 33, 36. Petitioners assert the underlying data on platted density in cities was available for
27 ready analysis in the County Auditor's files in 2006. However, as noted in Preliminary Matters, supra, the 2007
28 BLR which presents the city-specific data and computations was prepared in early 2007, after the County's
adoption of the 2006 Plan Update.

29 ¹⁹⁸ County Brief at 21, 28 (emphasis in original): "A minimum density within a range of densities does not
30 mandate development at that density. Rather, it is what it states – it is a *minimum* density. The UL and UC
31 zones provide a range of densities from 4 du/ac to 9 du/ac. The minimum density is the *lowest* number of units
32 that may be developed, development can occur at either that minimum density or at a *higher* density. The
average density after development occurs would virtually always, indeed even by definition, likely be much
higher than the minimum density."

¹⁹⁹ County Brief, at 45

²⁰⁰ 156 Wn.App. at 781. The Court also instructs the Board to decide all issues.

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Growth Management Hearings Board

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1 The land capacity analysis is a comparison between the collective effects of all
2 development regulations operating on development and the assumed densities
3 established in the land use element.²⁰¹

4 Thus, to determine future development capacity, the Guidelines advise looking not solely to
5 the minimum density in each zone, but to the “collective effect of all development
6 regulations.” As the Board sees it, this underscores the Court’s insistence on a review of
7 local circumstances – what is actually happening on the ground.
8

9 In Kitsap County, the preliminary 2007 BLR data demonstrated the “collective effect” of the
10 County’s then 5 du/ac minimum and a number of “reasonable measures” resulted in
11 achieved densities in the UL/UC lands of 5.6 du/ac.²⁰² Therefore, to answer the Court’s
12 question, even if 4 du/ac were found to be an appropriate urban density for Kitsap’s UL/UC
13 lands, that minimum would not provide an appropriate multiplier to determine land capacity.
14 Rather, the multiplier should reflect the collective effect of the County’s regulations –
15 including the 4-9 du/ac range allowed by the zoning and the enacted reasonable measures.
16 Here, the County acknowledges average platted densities in a 4-9 du/ac zone would
17 “virtually always ... be much higher than the minimum density.”²⁰³ But the County reports
18 achieved densities were uneven among its UGAs, with some not meeting the 5 du/ac
19 target.²⁰⁴ In setting its LCA capacity multiplier, the County must consider these facts on the
20 ground.
21
22

23
24 The County’s second argument for the 4 du/ac multiplier is consistency with cities. However,
25 the Board notes Kitsap cities do not apply the agreed UCLA methodology uniformly, just as
26 they do not have identical minimum densities.²⁰⁵ Bremerton’s input to the County’s 2006
27 Plan Update used an average build-out density of 7.5 du/ac rather than its minimum 5 du/ac
28

29 ²⁰¹ WAC 365-196-325(2)(a). The GMA guidelines are not mandatory for cities and counties. RCW
30 36.70A.190(4)(b). However, the Board is required to consider the guidelines when it makes a determination
31 concerning GMA compliance. RCW 36.70A.320(3).

32 ²⁰² FEIS, Appendix C, page 1

²⁰³ County Brief, at 28

²⁰⁴ 2006 Plan Update, at 2-9

²⁰⁵ See *Amicus* Brief, at 16

1 for its LDR designation.²⁰⁶ Bremerton also used market factors ranging from 10% to 90% for
2 its designated centers.²⁰⁷

3
4 In the recent Board case of *Wold v Poulsbo*²⁰⁸ the underlying facts illustrate, as does the
5 earlier Bremerton document, that the cities do not view the ULCA methodology as a rigid
6 mandate. The *Wold* Board pointed out that Poulsbo modified the County ULCA formula
7 using two additional variables based on local circumstances: a critical areas reduction factor
8 based on the city's own adopted buffers, and a city-specific average household size.²⁰⁹

9
10 Notwithstanding variations in city use of the ULCA formula, the County asserts use of a
11 uniform 4 du/ac minimum is appropriate because "use of the cities' minimum densities
12 ensures that when a city eventually annexes a UGA, the zoning is consistent with that city's
13 vision."²¹⁰ As the Board discussed above, "consistency" and "coordination" do not require
14 identical zoning regulations in adjacent jurisdictions or in a county UGA and the associated
15 city. In any event, the record of local circumstances shows the County **did not** adjust its
16
17

18 ²⁰⁶ Index 29762, at 3, 4.

19 ²⁰⁷ *Id.* at 5-6.

20 ²⁰⁸ CPSGMHB Case No. 10-3-0005c, Final Decision and Order (August 9, 2010), at 53-54.

21 ²⁰⁹ The lawfulness of the ULCA methodology itself in using minimum versus achieved densities was not
22 before the Board in *Wold*. Petitioners Wold and Lee challenged the City of Poulsbo's 2009 Comprehensive
23 Plan update alleging, *inter alia*, that Poulsbo unlawfully ceded its land use powers to the County by using
24 minimum densities (4 du/ac in RL zones) rather than achieved densities (6.7 du/ac in RL) as the basis for the
25 land capacity analysis in Poulsbo's plan. The Board held Poulsbo had not ceded its land use powers by use of
26 that part of the County formula.

27 The *Wold* Board noted Poulsbo's LCA was a 'voluntary' calculation, not part of the County-wide ten-year
28 population capacity analysis and was not used to size the Poulsbo UGA, thus the case was to be distinguished
29 from any decision on remand of the *Suquamish* case. The *Wold* Board stated:

30 The Board notes that [Poulsbo's] analysis uses an agreed methodology designed to ensure County-wide
31 consistency in land capacity calculations. The methodology does not appear to be based on a "bright line"
32 definition of urban or rural density. Rather, the methodology recognizes local zoning regulations, critical
33 area buffers, household size, and other local variables. The City modified the County formula to account
34 for its own buffers and household size. The City did not apply a generic "bright line" urban density but used
35 its actual zoned minimum densities – 4 du/net acre in the RL zone, 5 du/net acre in the RM zone, and 10
36 du/net acre in the RH zone.

37 The Poulsbo LCA demonstrated no UGA expansion was warranted, even using a minimum density multiplier.
38 Finally, the Board noted the achieved densities in Poulsbo's RL zone were 6.7 du/ac, so that "should Kitsap
39 County, on remand of the *Suquamish Tribe* case, choose or be required to use achieved densities in its land
40 capacity methodology, the City's Comprehensive Plan provides the necessary data." *Id.* at 54

41 ²¹⁰ County Brief, at 45

1 minimums to be identical with associated cities but amended **all** the UL/UC minimums,
2 including those for stand-alone UGAs, to match the minimums for its smallest city –
3 Poulsbo. The County points to a CPP stating:²¹¹

4 To maximize the efficient use of urban lands, subdivisions in Urban Growth
5 Areas shall be consistent *with the associated jurisdiction's* Comprehensive Plan
6 and underlying zoning districts.

7 Yet the County reduced its minimum densities throughout the Bremerton-associated UGAs
8 from a “consistent” 5 du/ac to an “inconsistent” 4 du/ac.
9

10 Thus, the Board finds that even if 4 du/ac were an appropriate urban density for UL/UC
11 zoning designations, use of 4 du/ac as a capacity multiplier in the LCA is not supported by
12 local circumstances, first, as it ignores the range of densities allowed in each designation
13 and the trend to higher achieved densities in the UL/UC, and second, as it applies a
14 capacity number lower than the minimums in UGAs associated with all but the smallest of its
15 cities.
16

17
18 *Oversized UGA and Inconsistency with GMA Goals.*

19 As previously set forth, the size of a UGA must be based on an OFM population projection,
20 and a county must include “areas and densities sufficient to permit the urban growth”
21 projected to occur over the next 20 years.²¹² The ten-year review required by RCW
22 36.70A.130(3) calls for a review of “the densities permitted within both the incorporated and
23 unincorporated portions of each urban growth area” for the purpose of accommodating
24 projected growth. The Board has previously acknowledged the GMA’s clear direction that
25 “UGAs should not be expanded absent a documented unmet need for additional urban
26 land.”²¹³
27
28
29

30
31 ²¹¹ CPP Element B.3.b (page 13), emphasis added

32 ²¹² RCW 36.70A.110(2).

²¹³ *1000 Friends v Snohomish County*, CPSGMHB Case No. 03-3-0019c, Corrected Final Decision and Order (Apr. 22, 2004) at 39; see also *North Clover Creek v Pierce County*, CPSGMHB Case No. 10-3-0003c, Final Decision and Order (Aug. 2, 2010), at 23.

1 In the *Thurston County* ruling, the Supreme Court addressed the question whether the OFM
2 population projection places any upward bounds on the size of a County's UGA. The Court
3 reasoned.²¹⁴

4 While the statute explicitly states the UGA must be large enough to
5 accommodate the projected population increase, it does not specifically state the
6 projected population limits the amount of land that may be designated urban. In
7 *Diehl*, the Court of Appeals held an OFM population projection constitutes both
8 the minimum and maximum size of a UGA. 94 Wn.App at 653. The court
9 reasoned that although the GMA does not explicitly restrict the size of a UGA,
10 "[o]ne of the goals of the GMA is to '[r]educe the inappropriate conversion of
11 undeveloped land into sprawling, low-density development.'" *Id.* If the size of a
12 UGA is not limited, rural sprawl could abound. Thus, although the GMA does not
13 explicitly limit the size of a UGA, to give meaning to the market supply factor
14 provision and in light of the GMA goal of reducing sprawl, we hold *a county's
UGA provision cannot exceed the amount of land necessary to accommodate the
urban growth projected by OFM*, plus a reasonable land supply factor.

15 The *Thurston* Court cited a law review article.²¹⁵

16 Oversized UGAs are perhaps the most egregious affront to the fundamental
17 GMA policy against urban sprawl, and it is this policy that the UGA requirements,
18 more than any other GMA mandate, are intended to further.
19 "Not too big, not too small" is the UGA sizing challenge. Kitsap's use of zoned minimums is
20 designed to ensure the UGA is not too small, but in effect, as discussed previously, the use
21 of a 4 du/ac multiplier – notwithstanding zoned ranges of 4 to 9 and achieved densities of
22 5.6 – creates a UGA that is too large. The Board has determined the UGA was oversized by
23 the County's down-zoning of UL/UC lands to 4 du/ac minimums; hence, the Board
24 concludes using 4 du/ac as the capacity multiplier for 70% of UGA residential lands is
25 inconsistent with GMA Goals 1 and 2.

26
27 *Inconsistency with BLR*
28
29
30

31 ²¹⁴ 164 Wn.2d at 351-352, emphasis added

32 ²¹⁵ Brent D. Lloyd, *Accommodating Growth or Enabling Sprawl? The Role of Population Growth Projections in
Comprehensive Planning under the Washington State Growth Management Act*, 36 Gonz. L. Rev. 73, 105
(2001).

1 The Board has previously noted the 2002 BLR indicated achieved densities in the Urban
2 Low designations at 3.9 du/ac, well below the County's target of 5 du/ac. The preliminary
3 2007 BLR data, used in the 2006 Plan Update, showed average achieved densities had
4 increased to 5.6 du/ac in the 2000-2005 period, thus meeting the target.²¹⁶ The Board has
5 determined the County's reduction of minimum densities to 4 du/ac thwarts the goal of the
6 2002 BLR, and the intent of subsequently-adopted Reasonable Measures, to increase the
7 rate and density of growth in urban areas; hence, the Board concludes using 4 du/ac as the
8 capacity multiplier for 70% of UGA residential lands is inconsistent with the BLR goals and
9 targets for increasing the rate and density of growth in urban, as opposed to rural, lands.
10

11
12 Inconsistency with the 2006 Plan Update

13 Because the County and the Board in 2006 made an assumption that 4 du/ac provided an
14 appropriate urban density, the Board in its FDO gave short shrift to Petitioners' assertions
15 that use of a 4 du/ac multiplier in the LCA created internal inconsistencies with the 2006
16 Plan Update policies. The FDO addressed the land capacity question as follows:²¹⁷
17

18 Petitioners object ... that reducing the low end of the urban residential density
19 assumption from 5 du/ac to 4 du/ac yields lesser land capacity within existing
20 UGAs, thereby precipitating the need to expand the UGAs in order to
21 accommodate allocated population growth. ...

22 Just as the Board agreed with the County in regard to urban density, the Board
23 here also agrees with the County on its methodology. The LCA largely rests upon
24 a residential assumption of 4 du/ac, which, as the Board has stated, is an
25 "appropriate" urban density. The consequence of adopting this lower assumption
26 is, in fact, to demonstrate a need for more urban land. The methodology of the
27 County is not flawed, nor is the use of a minimum of 4 du/ac rather than a trend
28 or mid-range density flawed or in violation of any GMA directive. However, the
29 Board does agree with Petitioners that *adopting this approach may dampen the*
30 *recent success the County has had in encouraging higher densities in the UGAs,*
31 since the County concedes that between 2000 and 2005, the County achieved
32 an average of 5.6 units/net acre for urban low density plats.

²¹⁶ 2006 Plan Update at 2-9

²¹⁷ FDO, at 16-17

1 The Court of Appeals rejected the Board's analysis as centered in a bright-line assumption.
2 The Court ruled, even if local circumstances support a 4 du/ac minimum, the Board must
3 also decide whether the County, by using this assumption in its land capacity analysis,
4 creates an inconsistency with the policies of its comprehensive plan.²¹⁸

5
6 The Board has set forth previously the inconsistency between a 4 du/ac downzone in
7 UL/UC designations and the 2006 Plan Update goals and policies for urban growth,
8 urban/rural differentiation, and efficient provision of services. Hence, the Board concludes
9 using 4 du/ac as the capacity multiplier for 70% of UGA residential lands is inconsistent with
10 comprehensive plan goals and policies.

11
12 The Board does not hold that the County must use achieved densities as its ULCA
13 multiplier. WAC 365-196-325(2)(c) provides:

14
15 *The land capacity analysis should evaluate what the development regulations*
16 *allow, rather than what development has actually occurred.* Many factors beyond
17 the control of counties and cities will control the amount and pace of actual
18 development, what density it is built at and what types and densities of
19 development are financially viable for any set of economic conditions. Counties
20 and cities need not ensure that particular types of development are financially
21 feasible in the context of short term market conditions. Counties and cities
22 should, however, *consider available information on trends* in local markets to
inform its evaluation of sufficient land capacity for the twenty-year planning
period.

23 The minimum allowed density may be an appropriate measure of capacity in zones where
24 higher ranges are not allowed, higher targets have not been set, or achieved densities are
25 near the minimum. On the facts before us, however, 4 du/ac is not consistent with the Plan.

26 **Conclusion - LCA**

27
28 The Board concludes, even if the County's reduction of residential minimum densities to 4
29 du/ac were found to be GMA-compliant, use of 4 du/ac as the LCA multiplier is not a
30
31
32

²¹⁸ 156 Wn.App at 781
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1 supportable measure of capacity based on local circumstances and consistent with the
2 GMA Goals, the BLR and the Plan.

3 4 **D. REMAND AND INVALIDITY**

5 **• Remand**

6 Pursuant to the terms of remand from the Court of Appeals, the Board has determined the
7 County's action reducing the UL/UC minimum densities from 5 du/ac to 4 du/ac does not
8 comply with the requirements and goals of the GMA. The use of 4 du/ac as the capacity
9 multiplier in the LCA therefore resulted in an oversized UGA. The Board has also
10 determined that the LCA should be recalculated: the minimum density is not an appropriate
11 multiplier in the Urban Restricted zone, where it "double dips," and should be reviewed in
12 the other urban low designations to determine whether minimums fairly measure
13 capacity.²¹⁹ The Board remands the 2006 Plan Update to the County to take legislative
14 action consistent with this Order.
15
16

17 With this remand, the Board notes that "cities and counties have discretion in their
18 comprehensive plans to make many choices about accommodating growth." RCW
19 36.70A.110(2). Here, for example, the record and the County's argument at hearing indicate
20 the County is negotiating UGAMAs with Bremerton and Port Orchard; these agreements
21 could provide targeted residential low-density ranges and tighter UGA boundaries.
22
23

24 The Board also acknowledges the changes in the regional housing market and local
25 government resources since 2006. While the Board's Order is necessarily based on the
26 2006 record and the terms of remand from the Court of Appeals, the Board anticipates the
27 County's compliance will be taken in light of 2011-2012 local circumstances.²²⁰
28

29
30 ²¹⁹ The Board on this remand does not have before it any questions concerning the County's medium and high
31 density residential designations or the related portion of the LCA.

32 ²²⁰ This might include coordination with ongoing planning initiatives, proposed UGAMAs, data developed for
the 2012 BLR, plats that may have vested on the urban fringe, annexations, lack of funding that was
anticipated for infrastructure, and the like. Current circumstances should be documented in the compliance
record.

1 In recognition of the unusual scope and complexity of this case, the Board sets a one-year
2 time-line for compliance and will require periodic reports of the progress the County is
3 making toward compliance.²²¹

4
5
6 • **Invalidity**

7 Petitioners request a determination of invalidity as to the County's 2006 UGA expansions,
8 urging the Board to consider the high risk of annexations or incorporations that would render
9 ineffective an order requiring the County to revisit its minimum densities, recalculate its land
10 capacity and re-size its UGAs.²²² Petitioners assert a determination of invalidity is
11 consistent with the Courts' holdings that oversized UGAs substantially interfere with the
12 goals of the GMA.²²³

13
14 The Board declines to impose invalidity on the present record.²²⁴ The compliance schedule
15 established below provides for periodic reports from the County. Petitioners may renew their
16 motion for invalidity in response to such reports and on a showing of changed
17 circumstances. Such motion shall be filed no later than 10 days after the deadline for the
18 status report, the County shall respond within 10 days, and the Board will set the matter for
19 hearing.
20
21

22 **V. ORDER**

23 Based upon the remand of the Court of Appeals in *Suquamish Tribe v CPSGMHB*, on
24 review of the briefs and exhibits submitted by the parties, the GMA, prior Board orders and
25 case law, having considered the arguments of the parties and having deliberated on the
26 matter, the Board ORDERS:
27
28

29
30 ²²¹ RCW 36.70A.300(3)(c)

²²² Petitioners' Opening Brief at 38

²²³ *Diehl*, 94 Wn.App. 645; *Thurston County*, 164 Wn.2d 329.

²²⁴ The Board notes the recent decisions of the Court of Appeals in *Clark County v WWGMHB (Karpinski)*, 161 Wn.App. 204 (2011) and *Clallam County v Dry Creek Coalition*, 161 Wn.App. 366 (2011), where the Court of Appeals cautions cities and others from taking action in reliance on County GMA enactments that have been found non-compliant or are on appeal. This would appear to preclude annexations or incorporations.

- 1) Petitioners have failed to carry their burden of proof in demonstrating that Kitsap County's adoption of Ordinances 370-2006 and 367-2007 was not guided by RCW 36.70A.020(3), (4) and (12). Petitioners' allegations pertaining to GMA Planning Goals 3, 4 and 12 are **dismissed**.
- 2) Kitsap County failed to comply with RCW 36.70A.110 and RCW 36.70A.070 (preamble) and was not guided by RCW 36.70A.020(1) and (2) when it adopted the portions of Ordinances 370-2006 and 367-2007 reducing the minimum density in the UL/UC designations and expanding the UGA boundaries based on the reduced density in its land capacity analysis. Because they were not adopted in compliance with the GMA, these provisions of Ordinances 370-2006 and 367-2007 were **clearly erroneous** in view of the entire record before the Board and in light of the goals and requirements of the GMA.
- 3) Kitsap County failed to comply with RCW 36.70A.110 in determining the capacity of its UGAs as set forth in this Order.
- 4) Findings and conclusions in the August 17, 2007, FDO based on a bright line density or contrary to the Board's findings and conclusions set forth in this Order are **reversed**.
- 5) The Board **remands** Ordinances 370-2006 and 367-2007 to Kitsap County to take legislative action to comply with the requirements of the GMA as set forth in this Order.
- 6) The Board **declines** to enter a determination of invalidity with respect to Ordinances 370-2006 and 367-2007.
- 7) The Board sets the following schedule for the County's compliance:

Item	Date Due
1 st Compliance Status Report	January 5, 2012
2 nd Compliance Status Report	May 4, 2012
Compliance Due	August 31, 2012
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	September 14, 2012
Objections to a Finding of Compliance	September 28, 2012

Response to Objections	October 11, 2012
Compliance Hearing – Location to be determined	October 16, 2012 10:00 a.m.

The parties are reminded that the Board is now a section of the Environmental and Land Use Hearings Office – ELUHO – with a new e-mail address central@eluho.wa.gov. The Board's Rules of Practice and Procedure have been updated effective July 21, 2011, and are now found at Chapter 242-03 WAC.

Dated this 31st day of August, 2011.

Margaret Pageler, Board Member

James McNamara, Board Member

William Roehl, Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-03-830.²²⁵

²²⁵ Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration. Pursuant to WAC 242-03-830, you have ten (10) days from the date of mailing of this Order to file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-03-240(1).

The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

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